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IN THE

Supreme Court of the United States

tw telecom of oregon llc,

Petitioner,

v.

City of Portland,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in holding, in conflict with several circuits, that a local government's regulation of a telecommunications carrier's access to public rights-of-way violates Section 253 of the Telecommunications Act of 1996 only if it entirely prevents the carrier from operating in the local market?

2. Did the Ninth Circuit err in holding, in conflict with several circuits, that percentage-of-gross-revenue fees imposed under a municipal franchise ordinance for use of public rights-of-way are "taxes," and therefore that federal jurisdiction to hear challenges to such fees under section 253 of the Telecommunications Act of 1996 was divested by the Tax Injunction Act of 1937?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Qwest Communications Corporation and Qwest Corporation, parties below, are being served as Respondents herein.

tw telecom inc., a publicly traded company, owns 100% of tw telecom holdings inc., which owns 100% of Petitioner tw telecom of oregon llc. (formerly Time Warner Telecom of Oregon LLC)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner tw telecom of oregon llc (formerly Time Warner Telecom of Oregon LLC) ("TWTC") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The District Court opinion partially invalidating the franchise ordinance at issue in this case is published at *Time Warner Telecom of Oregon, LLC v. City of Portland*, 452 F. Supp. 2d 1084 (D. Or. 2006). (Appendix B.)[1] The Court of Appeals opinion affirming in part and reversing in part the District Court is available at 322 Fed. Appx. 496, 2009 WL 965816 (9th Cir. 2009). (Appendix A.)

JURISDICTION

The Court of Appeals entered its judgment on April 8, 2009. On June 25, 2009, Justice Kennedy extended the time for filing a petition for a writ of certiorari until and including September 5, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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[1] A related opinion addressing claims by Qwest Corporation is at *Time Warner Telecom of Oregon, LLC v. City of Portland*, 452 F. Supp. 2d 1103 (D. Or. 2006).

RELEVANT STATUTORY PROVISIONS

This case involves Section 253 of the Telecommunications Act of 1996 (Pub. L. 104-104, 110 Stat. 56) ("Telecom Act"), entitled "removal of barriers to entry." Section 253(a) provides:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

47 U.S.C. § 253(a).

Section 253(c) of the Act provides:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

Id. § 253(c).

This case also involves the Tax Injunction Act of 1937, 28 U.S.C. § 1341, which provides that federal courts generally "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Appendix C reproduces the relevant portions of the City of Portland, Oregon (the "City" or "Portland") franchise ordinance challenged in this case, and the relevant portions of the Portland City Charter.

STATEMENT OF THE CASE

This case concerns a claim that Portland discriminates against certain telecommunications carriers in granting access to municipal rights-of-way, in violation of the Telecom Act.

A. The Telecom Act and federal preemption of state and local regulation

With the Telecom Act[2], Congress introduced a "fundamental[] restructur[ing] [of] local telephone markets." *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 371 (1999). The Telecom Act is designed to facilitate entry and competition by new telecommunications providers. To advance this purpose, the Telecom Act requires that "incumbent" carriers interconnect existing facilities with those of new entrants, and that state and local governments eliminate obstacles to competition. *Id.*

This case involves Section 253 of the Telecom Act, which "prohibits state and local regulation that impedes the provision of 'telecommunications service,'" *Verizon Communs., Inc. v. FCC*, 535 U.S. 467, 491 (2002), and targets state and local regulations that give preferential

[2] The 1996 Telecom Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

treatment to incumbent telecommunications providers and impede competition by new entrants.

Section 253(a) preempts any state or local regulation that would "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Congress in Section 253(c) preserved the power of state and local governments "to manage the public rights-of-way [and] to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and non-discriminatory basis . . ." 47 U.S.C. § 253(c).

TWTC is a competitive local exchange carrier ("CLEC") authorized to provide telecommunications services by the Federal Communications Commission ("FCC") and the Oregon Public Utility Commission. TWTC challenges Portland's regulations of telecommunications providers on the ground that they impede competition in violation of Section 253.

B. Portland regulates telecommunications providers through franchise ordinances

To provide services, telecommunications carriers must have access to municipal rights-of-way to lay conduit and fiber, and to place facilities. Before granting access to the municipal rights-of-way, the City requires carriers to obtain a franchise. All franchises must be adopted as ordinances by the Portland City Council and, as such, have the force of law.[3] Violations are punishable

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[3] *See* 7 Qwest Excerpts of Record (Olson ELI Depo.) at 8:6-13; City Charter ("Charter") § 10-207, Appendix C, at 48a.

by civil and criminal penalties, including fine and imprisonment.[4]

C. Terms of the franchise ordinances

1. The fee requirements

The City conditions a grant of franchise on payment of a recurring annual fee, which the City designates as "compensation for the benefits and privileges under this Franchise and in consideration of permission to use the Streets of the City."[5] These fees vary dramatically among carriers.[6] Carriers needing a general right of access to rights-of-way for placing facilities are subject to three different methods of compensation unilaterally dictated by the City. CLECs, such as TWTC, are charged 5% of all gross revenues.

The City owns a CLEC called the Integrated Regional Network Enterprise ("IRNE"), which provides telecommunications services to educational and governmental customers in the larger Portland area in competition with TWTC. IRNE has a uniquely favorable fee arrangement. Although IRNE's franchise fee provision nominally mirrors the fee provisions required

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[4] Charter § 2-107, Appendix C, at 48a.

[5] TWTC Franchise § 3.1, Appendix C, at 44a-46a; Addendum to Qwest Ninth Circuit Brief 1 (QCC Franchise).

[6] *See* TWTC Franchise § 3.1(A), Appendix C, at 44a-46a; Addendum to Qwest Ninth Circuit Brief 1 (QCC Franchise) § 3.1(A), 3 (IRNE Franchise) § 3(A)(1)(b), 8 (QC Temporary Revocable Permit) § c.l.

of other CLECs such as TWTC[7]—5% of its gross revenues—the City actually allows IRNE to make significant deductions from its "gross revenues" calculations. Specifically, IRNE exempts from "gross revenues" all revenues earned from the sale of what it calls its "INET" products and services.[8] The deduction of INET revenues by IRNE results in a huge reduction of fees. Thus, City-owned IRNE pays a mere fraction of the franchise fee it would have to pay if it were any other CLEC.

The City's rationale for allowing IRNE to deduct the INET revenues is that IRNE is just reselling those services; however, no other provider is allowed to deduct revenues received from resale of services. The City requires TWTC and other CLECs to include all revenue except "uncollectibles" regardless of whether the revenue is generated from reselling services or using facilities provided by other carriers.[9]

Also, the City charges Qwest Corporation ("QC"), the incumbent local exchange carrier in Portland, a utility license fee of 7% of its exchange access revenue,[10] instead of the franchise fee of 5% of gross revenue from all services that it charges TWTC. This difference is

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[7] Addendum to Qwest Ninth Circuit Brief 3 (IRNE Franchise) § 3(A)(I)(b).

[8] The INET is a communications network constructed by the cable company Comcast for the benefit of governmental and educational entities.

[9] TWTC Excerpts of Record 1 (Soloos email), 22 (Thomas Decl. I), at ¶ 7.

[10] These are basically charges for providing dial tone.

significant.[11] It puts TWTC at a competitive disadvantage with respect to the incumbent, QC.

The record shows that, in addition to being discriminatory, the City's rights-of-way fees are arbitrary. The City has never conducted a study to value its rights-of-way. It has never estimated the costs of maintaining the rights-of-way. It has neither obtained information nor conducted an analysis that would be necessary to determine what fair and reasonable compensation for the use of its rights-of-way would, in fact, be. And it has never evaluated the impact the franchise fees have on the regulated carriers, or the effect of the discriminatory fees on the carriers' ability to compete with one another.[12]

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[11] At the rate of 7% of exchange access revenue, QC paid $333,053.84 to the City for the month of January 2005. TWTC Excerpts of Record 342 (Barton Decl.), at ¶6. Based on this amount, it was estimated that QC would pay approximately $4 million to the City for FY 2005. *Id.* In comparison, if QC were charged the same franchise rate as is TWTC – 5% of gross revenue – it was estimated that QC's total franchise fees to the City for FY 2005 would be approximately $6.8 million. TWTC Excerpts of Record 342-3, at ¶7. This is more than a $2.5 million difference. *Id.* To further highlight the differing effects of the 5% of gross revenue fee versus the 7% of exchange revenue fee, at the rate of 5% of gross revenue, TWTC paid $213,333.63 to the City for FY 2004. TWTC Excerpts of Record 6-7 (Thomas Decl. II), at ¶5. If TWTC were charged the same franchise rate as is QC–7% on exchange access revenue–TWTC would have paid $120,955.13. *Id.* This is a $92,378.50 difference. *Id.*

[12] 8 Qwest Excerpts of Record (Olson Depo. I) at 69:21-70:9, 70:18-21, 9 (Soloos Depo. I) at 94: 12-21.

David Olson, the director of the City's Office of Cable Franchise and Management, admitted that the rights-of-way fees have "no necessary relations to impact on the right-of-way."[13]

This is not a case where differing use of the public rights-of-way justifies differing fees. There is simply no justification for the discriminatory fees that the City charges TWTC versus those it charges IRNE. Nor is there a difference in the way TWTC uses the rights-of-way versus the way QC does that would justify charging TWTC more than it charges QC. If anything, because QC's network is ubiquitous throughout the City and TWTC's network is fairly limited, QC's use of the rights-of-way is necessarily much greater than TWTC's. If TWTC were truly competing in a "fair and balanced legal and regulatory environment" (*In re California Payphone Ass'n*, 12 F.C.C.R. 14,191 at 14,206, ¶31 (1997)) it would be charged the same rate as QC, or even less.

2. The in-kind requirements

The City's Charter gives it expansive rights to demand conduit or fiber in exchange for a franchise. Charter sections 2-105(a)(24) and 10-210(d) authorize the City to "**require** conduits under the streets" in exchange for access to the streets.[14] Some of the franchise agreements, such as TWTC's, give the City discretion to require additional facilities at any time in

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[13] 7 Qwest Excerpts of Record (Olson ELI Depo.) at 31 :9-32:3.

[14] Appendix C, at 47a, 50a (emphasis added); *see* 9 Qwest Excerpts of Record (Soloos Depo. I) at 3.0:6-14.

the future.[15] The City exercises this "in-kind" contribution authority without fail, making such donations to the City a condition of every franchise, except the one the City granted to its own CLEC, IRNE.

Whenever a carrier plans to place facilities in the public right-of-way, it must advise the City. The City tells the carrier whether it wants in-kind facilities along the same route. The City then donates to IRNE the in-kind facilities demanded from franchisee carriers.[16]

Stated simply, if a telecommunications carrier wants to use Portland's rights-of-way, it must not only pay a franchise fee under the City's discriminatory regime, but it must also give the City fiber or conduit for IRNE. Otherwise, the City will not grant access. The City maintains no record of any liability on IRNE's books for any of these in-kind facilities given to IRNE.[17]

The contributions have not been trivial. According to the City's estimate, 11% of the conduit segments that

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[15] *See* 33 Qwest Excerpts of Record (QC Concise Statement of Material Facts ("QC CSMF")) ¶ 7; 29 Qwest Excerpts of Record (Soloos Depo. II) at 22:16-24:13; TWTC Franchise § 9.1, Appendix C, at 46a; 5 Addendum to Qwest Ninth Circuit Brief (TCG Franchise) § 9.1, 6 (McLeodUSA Franchise) § 9.1, 7 (Tyco Franchise) § 9.1.

[16] 33 Qwest Excerpts of Record (QC CSMF) ¶¶ 6, 7, 29 (Soloos Depo. II) at 11:18-12:16, 15:4-20, 16:24-18:7; 1 Addendum to Qwest Ninth Circuit Brief (QCC Franchise) §9.1; TWTC Franchise §9.1, Appendix C, at 46a.

[17] *See* 33 Qwest Excerpts of Record (QC CSMF) ¶ 14; 30 (Gray Depo. II) at 52:3-25, 31 (Thatcher Letter).

IRNE uses today were obtained from other carriers. This 11% does not include an as-yet-unused pool of in-kind assets that the City has stockpiled for use in the future at IRNE's discretion. Most of the in-kind assets are in Portland's downtown area, where construction costs are highest.[18]

The City admits that IRNE built its infrastructure at a "fraction of the cost normally associated with such a project" because of the availability of the in-kind facilities.[19]

As with the franchise fees, the City demands widely divergent in-kind compensation from the carriers. The City does not value or offset the amount of these differing payments of fiber or conduit. As a result, each carrier pays a different amount, contributing whatever in-kind conduit and fiber the City demands.

3. TWTC has been excluded from certain market sectors as a result of the city's fee structure and in-kind contribution requirements

The City admits that IRNE's prices for its telecommunications services are substantially reduced because it does not have to recover the costs of in-kind

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[18] *See* 33 Qwest Excerpts of Record (QC CSMF) ¶¶ 8, 9, 30 (Gray Depo. II) at 34:21-35:10; *see also* 27 Qwest Excerpts of Record (Gray Decl.) ¶ 18, 28 (Olson Depo. II) at 20:19-23,23:21-24:8, 8 (Olson Depo. I) at 67: 14-18, 16 (Jesuale Depo., Ex. 99).

[19] 8 Qwest Excerpts of Record (Olson Depo. I) at 86:16-22, 19 (Peterson Memo.) at 000099.

facilities in its prices.[20] Absent this preferential treatment, IRNE would have to build out its infrastructure just like other carriers and include the cost of this infrastructure in its prices. IRNE's representatives estimate that not doing so allows IRNE to offer its services at prices that are 20% to 40% below its competitors' prices. This estimate is low; IRNE's prices are in fact closer to 50% below what they would be if IRNE were required to recover its actual costs, as its competitors are.[21]

Similarly, if IRNE did not have preferential treatment from the City in being allowed to exclude almost 90% of its revenues from the gross revenues on which it pays a franchise fee, and instead had to pay the same franchise fees that TWTC and other CLECs pay, IRNE's prices would have to be higher than they are.

As a direct result of the City's discriminatory fee structure and its abuse of its franchising power to benefit IRNE, TWTC has lost business and has been unable to compete against IRNE for governmental and educational business in Portland. It has effectively been prohibited from providing telecommunications services to those markets in Portland.[22]

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[20] 30 Qwest Excerpts of Record (Gray Depo. II) at 52:3-23.

[21] *See* 8 Qwest Excerpts of Record (Olson Depo. I) at 86:1-13, 33 (QC CSMF) ¶ 26, 35 (Fitzsimmons Decl.) ¶¶ 6, 7, 12, 13, 32 (Jesuale email).

[22] *See* 20 Qwest Excerpts of Record (Nicholson Decl.) ¶ 6.

D. The case below

On September 28, 2004, TWTC and another CLEC, Qwest Communications Corporation ("QCC"), brought suit against the City in the United States District Court for the District of Oregon, for declaratory judgment and injunctive relief. They alleged that the City's practice of requiring free conduit or fiber from them and from other telecommunications providers in exchange for access to rights-of-way, coupled with its discriminatory fee scheme and other onerous regulatory requirements, violated Section 253 of the Telecom Act. On September 2, 2005, QC, the incumbent local exchange carrier operating in the Portland area, filed suit, claiming that the City's demand for free fiber and conduit from other telecommunications carriers violated Section 253. The two suits were later consolidated.

The parties cross-moved for summary judgment and the District Court issued two orders denying in part and granting in part the respective motions of TWTC, QCC, QC, and the City. The parties appealed.

While the appeal was pending, the Ninth Circuit sitting en banc decided *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2860 (2009). In *Sprint Telephony*, the Ninth Circuit overruled in part its prior decision in *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied sub nom. City of Tacoma v. Qwest Corp.*, 534 U.S. 1079 (2002), thereby rejecting its earlier view that a local ordinance violates Section 253(a) of the Telecom Act if it *may* have the effect of prohibiting service.

In rejecting *City of Auburn*, the Ninth Circuit in *Sprint Telephony* stated that a plaintiff suing a municipality under Section 253(a) must now show *actual or effective* prohibition, rather than the mere possibility of prohibition, in order to state a claim. 543 F.3d at 578 (*citing Level 3 Communications, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532 (8th Cir. 2007)). The Ninth Circuit did not directly address what type of action by a locality has the "effect of prohibiting . . . telecommunications service." 47 U.S.C. § 253(a). It was not required to make such a determination in *Sprint Telephony*, because the court found that the ordinance being challenged on its face could have been applied in a way that did not prohibit the provision of service.

The Ninth Circuit panel in this case ("the Panel") subsequently issued a non-published opinion, ruling, without analysis or explanation, that (1) "the in-kind requirements Qwest challenges" . . . "do not have the effect of prohibiting the provision of telecommunications services, as demonstrated by Qwest's continued operation," citing the recent *Sprint Telephony* decision, 543 F.3d at 578; (2) the per-foot fee charged to QCC does not have the effect of prohibiting QCC from providing service; (3) the 5% gross revenue fees imposed on TWTC are taxes with the meaning of the Tax Injunction Act, and therefore the district court was deprived of jurisdiction to review the fee, citing *Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1183-84 (9th Cir. 2006); and (4) the district court erred in determining that TWTC's in-kind requirements violated § 253 because these

requirements did not have the effect of prohibiting the provision of services. (Appendix A, at 3a-5a)[23]

The Panel failed to address TWTC's, QCC's, and QC's challenge to the City's discriminatory practice of requiring the provision of in-kind facilities from other carriers and then donating those facilities to IRNE, allowing it to underprice its competitors. It also failed to examine the cumulative effect of the challenged laws (both the fee and in-kind contribution provisions) in combination.

While the Panel did not state a test for what constitutes an effective prohibition, it did suggest that a local action must completely prevent a carrier from operating before it runs afoul of Section 253(a). Thus, it appears that the Ninth Circuit would require a non-incumbent provider such as TWTC to be completely driven out of the local market by discriminatory regulations and to suffer significant losses before it could show that local regulation violates Section 253(a). As shown below, this conclusion is contrary to Congress' intention in adopting Section 253(a).

[23] The Panel also ruled on certain state contract law issues relating to interpretation of the franchise language.

REASONS FOR GRANTING THE PETITION

A. Must carriers such as TWTC be completely driven out of a market by local regulations in order to show a violation of Section 253?

1. As a result of the Panel's decision, the circuits are split on what it means to have the "effect of prohibiting" telecommunications service under Section 253(a)

Certiorari should be granted because the Court of Appeals erroneously limited the preemptive effect of an important part of the Telecom Act and, as a result, created a significant conflict in the courts of appeals. This Court's intervention is required to settle and provide uniformity to this important area of federal law.

Relying on its recent decision in *Sprint Telephony PCS, L.P. v. County of San Diego*, the Panel held that the in-kind requirements that TWTC, QC, and QCC challenged "do not have the effect of prohibiting the provision of telecommunications services, as demonstrated by Qwest's continued operation" and that the district court erred in determining that the City's in-kind requirements violated Section 253 because these requirements did not have the effect of prohibiting the provision of services. (Appendix A, at 3a-5a.) In short, the Panel holds that a local action must completely prevent a carrier from operating before it runs afoul of Section 253. *Id.*

This is in direct conflict with the standard adopted by the First, Second, Eighth, and Tenth Circuits, each

of which generally agrees with the FCC's decision in *In re California Payphone Ass'n*, that a local law "has the 'effect of prohibiting' the ability of any entity to provide" telecommunications service if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." 12 F.C.C.R. at 14,206 ¶ 31. *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 15, 18 (1st Cir. 2006) (the relevant inquiry is whether "the [regulation] materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment"; *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002), *cert. denied*, 538 U.S. 923 (2003) (same); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271 (10th Cir. 2004) (the relevant inquiry under Section 253(a) is whether a regulation "would 'materially inhibit' the provision of [telecommunications] services"); *Level 3 Commc'ns, LLC v. City of St. Louis*, 477 F.3d at 533 (a section 253(a) plaintiff "need not show a complete or insurmountable prohibition, . . . but it must show an existing material interference with the ability to compete in a fair and balanced market").[24]

Thus, in those other circuits local regulations that substantially raise a private carrier's cost of doing

[24] Other differences exist among the circuits in the interpretation and application of Section 253. These differences (discussed in detail in the Solicitor General's brief as amicus curiae submitted in May 2009 in response to petitions for writs of certiorari in *Level 3 Communications, LLC v. City of St. Louis*, No. 08-626, and *Sprint Telephony PCS, L.P. v. San Diego County*, No. 08-759) create further uncertainty and inconsistency in the regulation of telecommunications services throughout the country.

business in the city have been preempted by Section 253(a) (*Qwest Corp. v. City of Santa Fe*, 380 F.3d at 1271), as have those that create competitive inequities in the market (*N.J. Payphone Ass'n, Inc. v. Town of W. New York*, 299 F.3d 235, 247 (3d Cir. 2002) (unlawful to "create a set of rules the purpose of which is to select one company over others for preferential treatment"), *TCG N.Y., Inc.*, 305 F.3d at 79 (preferential treatment of incumbent provider unlawful)). Similarly, a fee that is unrelated to a company's use of city rights-of-way has been held to violate § 253(a) of the Act as an economic barrier to entry. *Puerto Rico*, 450 F.3d at 18, 22 ("fair and reasonable" compensation must be "related to the actual use of rights-of-way"; 253(a) bars not only direct barriers but also any requirements that, if imposed cumulatively by numerous municipalities, would "significantly increase a [provider's] costs and reduce the profitability of its operations"); *N. J. Payphone Ass'n, Inc. v. Town of W. New York*, 130 F.Supp.2d 631, 638 (D.N.J. 2001) ("Plainly, a fee that does more than make a municipality whole is not compensatory in the literal sense, and risks becoming an economic barrier to entry") *aff'd*, 299 F.3d 235 (3d Cir. 2002); *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F.Supp.2d 805, 817 (D. Md. 1999) ("local governments may not set their franchise fees above a level that is reasonably calculated to compensate them for the costs of administering their franchise programs and of maintaining and improving their public rights-of-way"), *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2000).

Here, the City's franchise fee regime results in substantial costs and significant competitive inequities

for TWTC and other carriers. It has put TWTC and other carriers at a competitive disadvantage vis-à-vis the City-owned CLEC, IRNE. It has also put TWTC at a competitive disadvantage vis-à-vis the incumbent local exchange carrier, QC, and other CLECs that use QC's facilities. It has effectively blocked TWTC from the governmental and educational markets in Portland. Notwithstanding the City's discriminatory treatment of TWTC and other carriers, the Ninth Circuit determined that TWTC cannot show a violation of Section 253 because it was not completely prevented from operating in Portland. This result eviscerates Section 253 and creates a conflict with other circuits that have interpreted the Telecom Act to require a material, but not a complete, inhibition on competition. This split on an important issue of federal telecommunications policy requires review by this Court.

2. This Court should address the circumstances under which a local regulation has the "effect of prohibiting" the provision of service under the Telecom Act

This Court should clarify the proper interpretation of Section 253(a) and the standard for establishing that a local requirement has the "effect of prohibiting" the provision of a telecommunications service. The language, structure, and legislative history of section 253(a) all lead to the conclusion that a carrier need not show a complete inability to operate to prevail.

TWTC contends that the proper test for determining whether a local requirement has the "effect of prohibiting" the ability of a carrier to provide

"any . . . telecommunications service," 47 U.S.C. § 253(a), is whether the requirement imposes costs (such as higher fees and in-kind contribution requirements) on one carrier that result in price increases for that service, while simultaneously decreasing a competitor's costs (through lower fees or provision of free facilities). Obviously, a local government that discriminates among competitors in the imposition of conditions on the use of public rights-of-way interferes with a carrier's right to "compete in a fair and balanced market." *In re California Payphone Ass'n*, 12 F.C.C.R. at 14,206 ¶ 31. This is particularly true when the local government interferes in the market to give substantial advantages to its own CLEC, as the City has done to favor IRNE. Its franchising scheme and its actions have resulted in both TWTC and QC losing customers and has effectively foreclosed TWTC from serving the governmental and educational customers targeted by IRNE. Clearly, the effect of a local action rises to the level of an "existing material interference" (*id.*) when it results in a loss of customers or a foreclosure from a segment of the market, as it has done here.

The text of the statute does not support the Panel's conclusion that a complete exclusion from the local market is a necessary prerequisite for finding a local regulation in violation of Section 253(a). The statute provides that no state or local regulation "may prohibit or have the effect of prohibiting the ability of **any** entity to provide **any** interstate or intrastate telecommunications service." 47 U.S.C. § 253(a) (emphasis added). The result reached by the Panel in this case construed "any . . . telecommunications service" to mean "**all** telecommunications service" – i.e., a local

regulation is barred by the Telecom Act only if it prohibits **all** service by a particular carrier. But this Court has interpreted "any" to mean not "all," but "one" or "some": "'[r]ead naturally, the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind."'" *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 128 S. Ct. 831, 835-36 (2008) (*quoting United States v. Gonzales*, 520 U.S. 1, 5 (1997)). Thus, the plain statutory language indicates that a local regulation runs afoul of Section 253(a) if it prohibits one or some service by a carrier. In this case TWTC showed that Portland's regulations prohibited "some" services: they completely exclude TWTC from the educational and governmental markets and impair TWTC's ability to compete in other markets. The Ninth Circuit erred in holding that TWTC had no claim because it was not entirely excluded from all sectors of the local market.

The Panel's interpretation of Section 253(a) further makes it impossible to give effect to Section 253(c), which protects the right of local governments to receive fair and reasonable compensation for use of rights-of-way, but only as long as the compensation is "competitively neutral and nondiscriminatory." If Section 253(a) allows the City to impose any burdensome and discriminatory regulation that stops just short of a complete prohibition, then it is impossible to invoke the mandate of Section 253(c) that compensation for use of rights-of-way be neutral and non-discriminatory. By contrast, if the Panel had adopted TWTC's interpretation of Section 253(a) – that a local regulation is unlawful if it puts a particular carrier at a competitive disadvantage – then Section 253(c) could meaningfully be applied to

determine whether the City charges for use of its rights-of-way in a neutral and non-discriminatory fashion. This interpretation would properly give effect to the structure of Section 253. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).[25]

The legislative history of the statute also confirms that Congress intended to bar local requirements that materially increase a carrier's cost and that are applied in a fashion that favors certain competitors at the expense of others. The nondiscrimination and competitive neutrality limitations in section 253(c) were essential to achieving Congress's objective of opening local markets to free and fair competition. Congress believed that discriminatory burdens were the kind of impediment to competition that should be preempted. *See, e.g.*, S. Rep. No. 103-367, at 56 (1994) ("Currently, one barrier to the deployment of competitive networks has been the unequal treatment by certain local governments of incumbent network providers and new entrants in the assessment and collection of local franchise fees in connection with the use of public rights-of-way."); H. Rep. No. 104-204, at 75 (1995) ("The purpose of [a competitive neutrality provision] is to create a level playing field for the development of competitive telecommunications networks. Harmonizing the assessment of fees from all providers is one means of creating this parity."). The Panel's interpretation of

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[25] "[W]ords of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole." *Id.* at 133.

Section 253(a) as authorizing any local regulation that stops short of a complete prohibition makes it impossible to put into effect Congress' intent to maintain non-discriminatory fees for use of rights-of-way.

Thus, the text, structure and legislative history of section 253 all confirm that Congress meant to preempt localities from imposing significant financial and other burdens on some carriers and not others, even if the affected carriers are still able to operate. Section 253 does not permit the kind of franchise discrimination in which the City engages. A carrier should not have to be completely forced out of operation before it has a right to challenge a city's regulations.

3. This case is the right vehicle for reviewing the Section 253(a) standard: Distinguishing the *Sprint Telephony PCS* and *Level 3 Communications, L.L.C.* petitions

While this Court during the last term declined to grant a petition for writ of certiorari in two cases[26] concerning the scope of federal preemption of local regulation under Section 253, the legal and procedural posture of the current case distinguish it from those two earlier cases, and render the issue ripe for review.

As noted above, the Panel's holding that a complete bar to competition is a necessary prerequisite to a

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[26] *Level 3 Communications, LLC v. City of St. Louis*, No. 08-626, and *Sprint Telephony PCS. L.P. v. San Diego County*, No. 08-759.

challenge under Section 253(a) puts the Ninth Circuit in conflict with other circuits. That sort of stark conflict was not presented by the *Sprint Telephony PCS* and *Level 3 Communications* cases. The Solicitor General last term concluded, for example, that the Ninth Circuit's *Sprint Telephony PCS* decision "need not be read as confining the application of Section 253(a) to only those legal requirements that completely bar new entry." Solicitor General's Brief in *Level 3 Communications, LLC v. City of St. Louis*, No. 08-626, and *Sprint Telephony PCS. L.P. v. San Diego County*, No. 08-759 ("SG Brief"), at 6.

The Solicitor General meanwhile acknowledged that requiring a telecom provider to prove complete exclusion from the market before it may challenge a local regulation under Section 253(a) – the very holding in this case – "would undermine the federal competition policies that the provision seeks to advance." *Id.* Likewise, the FCC has interpreted Section 253(a) to reach any legal barrier that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *In re California Payphone Ass'n*, 12 F.C.C.R. 14,206 ¶ 31.

The Panel in this case applied Section 253(a) in a way that both creates a conflict among the circuits, and is at odds with the Solicitor General's and the FCC's interpretation of the statute. Review by this Court is necessary to advance uniformity in federal telecommunications policy.

The procedural posture of this case also supports grant of a writ of certiorari. In its amicus brief last term, the Solicitor General stated that neither the *Sprint Telephony PCS* nor the *Level 3 Communications* case was the correct vehicle for reviewing the section 253(a) standard, because the facts were not particularly well developed in either case. SG Brief at 20-21. This is especially true of the *Sprint Telephony PCS* case, which was a prima facie challenge to the subject ordinance.

This case is different. The carriers in this case fully developed the facts through discovery to show the discriminatory effects of the City's regulatory scheme. The record unequivocally shows that excessive and discriminatory fees, mandatory in-kind contributions, and Portland's favorable treatment of IRNE, have put other carriers at a competitive disadvantage and effectively excluded them from the governmental and educational markets in Portland.

The District Court and the Ninth Circuit in this case applied the *Sprint Telephony PCS* decision in such a manner as to require complete exclusion from the market in order to show a violation of Section 253(a). Whether this interpretation of the Telecom Act is consistent with Congressional intent is now ripe for review by this Court. Continued uncertainty about the proper interpretation of Section 253(a) will enable local governments to impose the kind of discriminatory regulations seen in Portland. And the result will be the frustration of federal competition policy.

B. Are percentage-of-revenue fees under a telecommunications franchise ordinance "taxes" for purpose of the Tax Injunction Act?

Certiorari should be granted for the additional reason that the Panel eviscerated an important part of the Telecom Act when it held that federal jurisdiction was divested by the Tax Injunction Act ("TIA"). The Panel created a conflict among the circuits regarding federal jurisdiction to void excessive and discriminatory local right-of-way fees. This Court's intervention is necessary to settle this important question of federal law and restore uniformity.[27]

Local governments can too easily thwart competition by imposing significant financial burdens on telecommunications providers, particularly where those burdens are imposed unequally. That is why Congress limited local governments to charging only "fair and reasonable compensation" for use of the rights-of-way and provided further that such charges be "competitively neutral and nondiscriminatory." Telecom Act § 253(c). The TIA, enacted in 1937, provides that federal courts generally "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." 28 U.S.C. § 1341. The Panel in this case held that Portland's percentage-of-revenue fees are "taxes" for purposes of the TIA and not subject to review by the federal courts.

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[27] The §253 cases in which the writ of certiorari was denied last term, *Sprint Telephony PCS* and *Level 3 Communications*, did not concern application of the TIA to the Telecom Act.

As shown below, the language and structure of the Telecom Act demonstrate that Congress believed that excessive and discriminatory local right-of-way fees are not taxes. Moreover, reference to authority from this Court compels the conclusion that the TIA does not apply when a later federal statute—in this case, the Telecom Act—indicates that Congress contemplated federal jurisdiction. And, it was well-established, both before the TIA was adopted and after, that fees for the use of public rights-of-way are usage fees, not taxes.

1. There is a de facto circuit split regarding the application of the TIA to Section 253

Several circuit courts have accepted jurisdiction to resolve claims regarding excessive or discriminatory fees under the Telecom Act. Those courts have not invoked the TIA as grounds to avoid addressing the legality of the fees. The Panel's decision in this case to foreclose federal jurisdiction based on the TIA (Appendix A, at 4a) reflects a split with those other circuits requiring resolution by this Court.

Where it applies, the TIA is "jurisdictional," and "federal courts are duty-bound to investigate the application of the Tax Injunction Act regardless of whether the parties raise it as an issue." *Folio v. City of Clarksburg*, 134 F.3d 1211, 1214 (4th Cir. 1998). The First, Second, Third, Sixth, Tenth, and Eleventh Circuits have exercised jurisdiction to resolve claims that excessive or discriminatory local right-of-way fees violate the Telecom Act, without any suggestion that the TIA is a barrier. *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d at 22-23, *Qwest Corp. v. City of*

Santa Fe, 380 F.3d at 1270-72, *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d at 80, *Bell South Telecom., Inc. v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001); *N.J. Payphone Ass'n v. Town of W. New York*, 130 F. Supp. 2d at 638, *aff'd* 299 F.3d 235, *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000), *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d at 817, *vacated and remanded on other* grounds, 212 F.3d 863; *see also Qwest Comm. Corp. v. City of New York*, 387 F. Supp. 2d 191, 194 (E.D.N.Y. 2005), *T.C. Systems, Inc. v. Town of Colonie*, 263 F. Supp. 2d 471, 489 (N.D.N.Y. 2003).

The Ninth Circuit itself has issued three prior opinions addressing on the merits claims that local usage fees were preempted by Section 253, again without any suggestion that the TIA blocks federal jurisdiction: *City of Auburn*, 260 F.3d at 1175-80, *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1242-45 (9th Cir. 2004), *cert. denied*, 544 U.S. 1049 (2005), and *Qwest Communs. Inc. v. City of Berkeley*, 433 F.3d 1253, 1257-59 (9th Cir. 2006).

The extensive body of precedent applying Section 253 to excessive local right-of-way fees is strong evidence that such actions are not barred by the TIA. The Panels' decision in this case that the TIA bars a challenge to the gross revenue fees conflicts with those cases and requires review by this Court.

2. The language and structure of the Telecom Act show that compensation for the use of public rights-of-way is not a "tax"

It is clear from the language and structure of the Telecom Act that Congress believed that excessive and discriminatory right-of-way fees are not taxes.

First, Section 253(c) addresses "compensation" received by local governments in exchange for the use of rights-of-way. Congress' use of the term "compensation" was intentional. The Telecom Act requires linkage between the burden imposed by the carrier's use of the right-of-way and the level of compensation the carrier pays. Had Congress intended the payment for use of a right-of-way to be considered a "tax," no such linkage would have been required, and section 253(c) would not have employed the term "compensation."

In addition, because the Telecom Act states that it does not impair or supersede local taxes, while at the same time regulating fees for use of rights-of-way, those fees must not be "taxes." Section 601(c)(2) of the Telecom Act states that the Act shall not be "construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation . . . ." 110 Stat. 143 (codified at note to 47 U.S.C. § 152). But in Section 253 Congress unequivocally expressed its intent to preempt local laws that impose excessive and discriminatory fees for use of public rights-of-way that have the effect of prohibiting the provision of telecommunications service. The only

way to harmonize Sections 601 and 253 is to conclude that Congress believed that such fees are not taxes.

Since Section 601 and the TIA have the same purpose—preservation of local revenue—it follows that the term "tax" has the same meaning in Section 601 and the TIA, and that a fee that is not a tax under Section 601 is likewise not a tax under the TIA. The reverse would also be true. In order to read Section 601 consistently with the TIA, it is necessary to conclude that local right-of-way fees imposed on telecom carriers cannot be "taxes."

The Panel's decision to the contrary eviscerates section 253(a). If a locality is permitted to impose financial burdens in the guise of a tax, Congress's intent to promote competitive entry would be thwarted. A saving clause such as Section 601 of the Telecom Act – which disclaims an intent to impair or supersede local taxes — cannot be construed in a way that would defeat the purpose of the Telecom Act. *See United States v. Locke*, 529 U.S. 89, 106 (2000) ("We decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.") *AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998) (savings clause does not apply to claims that are inconsistent with preemptive provision; "'the act cannot be held to destroy itself'") (citation omitted); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) ("we do not believe Congress intended to undermine this carefully drawn statute through a general savings clause").

This case exemplifies how the Panel's ruling defeats the will of Congress. Because of Portland's regulatory

scheme, TWTC has lost customers and has been effectively excluded from the local governmental and educational market. These are exactly the kinds of impediments to entry that Congress meant to preempt with section 253(a). Section 601 and the TIA cannot be construed to permit a locality to accomplish this prohibited result. The only way to harmonize these provisions is to conclude that fees imposed for the use of the rights-of-way by telecommunications carriers are not taxes.

Moreover, the Panel's ruling would render section 253(c) surplusage. If right-of-way fees imposed on telecommunications carriers are taxes and thus not subject to section 253(a), there would have been no need to impose a requirement in Section 253(c) that compensation for the use of rights-of-way be "fair and reasonable" and "competitively neutral and nondiscriminatory." 47 U.S.C. § 253(c). The inclusion in Section 253 of subsection (c) makes clear that excessive and discriminatory right-of-way fees are subject to preemption under subsection (a) and hence are not taxes.

The language, structure, and purposes of the Telecom Act thus refute the Panel's ruling that percent-of-revenue local fees for the use of public rights-of-way are "taxes."

3. Congress contemplated federal jurisdiction for Section 253 claims

The TIA does not apply when a later federal statute, such as the Telecom Act, indicates that Congress contemplated federal jurisdiction. *SEPTA v.*

Pennsylvania Pub. Util. Comm'n, 802 F. Supp. 1273 (E.D. Pa. 1992). *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), establishes the standard for determining whether a later-enacted statute supports federal jurisdiction that would otherwise be barred by the TIA. An "unequivocal statement" of intent to create an exception to the TIA is not required. 425 U.S. at 472-73. Instead, if the later statute and its legislative history show that Congress "contemplated" that certain actions can be brought in federal court, the TIA does not apply. *Id.* at 473.

The Telecom Act is a later law that establishes federal policy and specifically restricts state and local authorities from requiring telecommunications carriers to pay excessive and discriminatory fees for the use of public rights-of-way. Because Congress expressed a specific intent to limit such local actions, the TIA's policy of preventing federal interference with local fiscal operations is inapplicable.

The legislative history of the Telecom Act confirms that Congress intended federal courts to have jurisdiction in cases such as this. It specifically addresses the forum for claims that localities exceeded their authority under section 253(c)—precisely the claim that TWTC has made in this case. Senators Feinstein and Gorton, the principal sponsors of the amendment to remove FCC authority to preempt violations of section 253(c), expressly stated that the proper forum to resolve those issues is the "Federal court," 141 Cong. Rec. S8171 (daily ed. June 12, 1995) (statement of Sen. Feinstein), and "the Federal district court," 141 Cong. Rec. S8213 (daily ed. June 13, 1995) (statement of Sen. Gorton).

The TIA cannot be construed to bar federal jurisdiction over Section 253 claims, which Congress intended to be resolved in federal court. *See Moe*, 425 U.S. at 473 (legislative history indicated that Congress "contemplated" that statute would permit certain claims to be brought in federal court).

4. The TIA does not apply to user fees

The TIA does not by its terms apply to Portland's 5% right-of-way fee. The words of the TIA – "tax" and "assessment, levy or collection" – are terms of art that must be construed in accordance with their established legal meaning, particularly as it existed when the TIA was enacted in 1937.

As shown below, a tax has long been understood to be distinct from a user fee, and for this reason it was well settled by 1937, when the TIA was adopted, that a fee for the use of public rights-of-way was not a tax. The City's 5% right-of-way fee is not a tax under this established doctrine. This conclusion is particularly warranted because (1) the TWTC franchise refers to the charge as "compensation for the benefits and privileges under this Franchise and in consideration of permission to use the Streets of the City,"[28] not a tax, and (2) the franchise requires, as additional compensation, the provision of in-kind facilities,[29] which is not characteristic of a tax.

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[28] TWTC Franchise, § 3.1 (Appendix C, at __).

[29] Charter § 2-105(a)(24), § 10-210(d) (Appendix C, at __).

Under the common understanding of the term, a tax is not a charge for a benefit bestowed. "A tax is not an assessment of benefits." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 522 (1937). A long line of cases have held that a fee that is paid to receive a service or good from the government is not a tax. *See Keokuk Northern Line Packet Co. v. City of Keokuk*, 95 U.S. 80, 85 (1877) (fee imposed for landing at a city wharf was not a tax because wharfage was a service which a vessel may use or not at its election), *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 97 (1893) (local fee for installing utility poles in rights-of-way not a tax but "more in the nature of a charge for the use of property belonging to the city"), *Western Union Tel. Co. V. Borough of New Hope*, 187 U.S. 419, 427 (1903) (charge imposed for maintaining utility poles in public rights-of-way not a tax); *see also, National Cable TV Ass'n v. United States*, 415 U.S. 336, 340-41 (1974) (a tax can be levied arbitrarily and in disregard of the benefits it bestows on the taxpayers; whereas a fee "is assessed in response to a voluntary request and is 'a grant which . . . bestows a benefit on the applicant, *not* shared by other members of society.'").

Also, under the TIA, user fees have been held not to be taxes. *Arizona Life Coalition Inc. v. Stanton*, 515 F.3d 956, 962-963 (9th Cir.), *cert. denied*, 129 S. Ct. 56 (2008) (payment to obtain a "special organization" license plate "is more akin to a contractual debt than a state imposed tax"; TIA does not bar jurisdiction), *ACLU of Tennessee v. Bredesen*, 441 F.3d 370, 372-75 (6th Cir.), *cert. denied*, 548 U.S. 906 (2006) (fee for specialty license plates held to be "most closely analogous to payments for simple purchases from the government" and not

taxes under the TIA, even though part of the revenue was used to benefit the public at large), *Lipscomb v. Columbus Muni. Separate School Dist.*, 269 F.3d 494, 500 (5th Cir. 2001) (attempt to invalidate leases of state land not barred by TIA because "lease obligations are a creature of contract, not a mandatory obligation imposed by the state as taxes are.").

Here, the franchise fee payments by TWTC to the City are more akin to contract payments than to a tax. The City's right-of-way management fees are a quid pro quo for benefits received. The fact that the City's assessments are analogous to a demand for rent is significant. When government is assessing a franchise fee, as it does when it leases access to its rights-of-way, the fees it charges are not taxes. This is because the government is exacting charges for a specific benefit granted to a specific user.

Under the Panel's decision, the rent a state or local government receives for use of a publicly-owned stadium, convention hall, or other public building would be a tax, as would the proceeds from sale of surplus property, if the money were placed in the government's general fund. *See Qwest Corp. v. City of Surprise*, 434 F.3d at 1183-84 (cited by the Panel, Appendix A, at 4a). Such a result would be absurd. Moreover, under the rule adopted by the Panel, a city could avoid the Section 253(c) restrictions on the compensation it can charge for use of public rights-of-way by simply paying the fees into the City's general fund. The District Court in *Qwest Commc'ns Inc. v. City of Berkeley*, 146 F. Supp. 2d 1081 (N.D.Cal. 2001), got it right: such a rule "would vitiate the preemptive purpose of the [Telecom Act] because

federal courts would have to abstain, pursuant to the TIA, every time there is a challenge that a fee violates § 253(c)." *Id.* at 1092.

The 5% franchise fee that the City charges TWTC is compensation for the right to use public rights-of-way, and such a fee is not a tax. Because the franchise fee is not a tax, the TIA does not divest the federal courts of jurisdiction to apply Section 253. Review by this Court is necessary to bring uniformity to the federal court's interpretation of the Telecom Act.

CONCLUSION

For the foregoing reasons, TWTC respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED APRIL 8, 2009

UNITED STATES COURT OF APPEALS NINTH CIRCUIT

Nos. 06-36023, 06-36024, 06-36061.

TIME WARNER TELECOM OF OREGON, LLC, an Oregon limited liability company,

Plaintiff,

and

QWEST COMMUNICATIONS CORPORATION, a Delaware corporation Qwest Corporation, a Colorado corporation,

Plaintiffs-Appellants,

v.

City of Portland, an Oregon municipal corporation,

Defendant-Appellee.

Time Warner Telecom of Oregon, LLC, an Oregon limited liability company,

Plaintiff-Appellant,

Appendix A

and

Qwest Communications Corporation, a Delaware corporation, Qwest Corporation, a Colorado corporation,

Plaintiffs,

v.

City of Portland, an Oregon municipal corporation,

Defendant-Appellee.

Time Warner Telecom of Oregon, LLC, an Oregon limited liability company; Qwest Communications Corporation, a Delaware corporation; Qwest Corporation, a Colorado corporation,

Plaintiffs-Cross/Appellees,

v.

City of Portland, an Oregon municipal corporation,

Defendant-Cross/Appellant.

Argued and Submitted Feb. 4, 2009.
Filed April 8, 2009.

Appendix A

Before: PAEZ and RAWLINSON, Circuit Judges, and JENKINS*, District Judge.

MEMORANDUM**

As clarified at oral argument, Qwest Communications Corporation (Qwest) appeals the district court's judgment in favor of the City of Portland (the City) on Qwest's challenge to the franchise fees based on per-foot usage, and the "in-kind" provisions of its franchise agreement.

Time Warner Telecom of Oregon, LLC (TWT) appeals the district court's judgment in favor of the City on TWT's challenge to the five percent gross revenue fee included in its franchise agreement, and the district court's determination that the services provided by TWT were included within the agreement's definition of "telecommunication services."

The City cross-appeals the district court's determination that TWT's "in-kind" requirement violated the Telecommunications Act.

1. The in-kind requirements that Qwest challenges, which were provided to the City twelve years ago, do not vest the City with broad discretion, and they do not

* The Honorable Bruce S. Jenkins, Senior U.S. District Judge for the District of Utah, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

have the effect of prohibiting the provision of telecommunications services, as demonstrated by Qwest's continued operation. *See Sprint Telephony PCS, LP v. County of San Diego*, 543 F.3d 571, 578 (9th Cir.2008) (en banc) (setting the standard for whether a requirement violates the Telecommunications Act). Therefore, these requirements do not violate § 253(a) of the Telecommunications Act.

2. Similarly, because the annual fees imposed on Qwest, calculated on per-foot usage, do not have the effect of prohibiting Qwest from providing telecommunications services, they do not violate § 253(a).

3. The five percent gross revenue fees imposed on TWT by the City were taxes within the meaning of the Tax Injunction Act. *See Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1183-84 (9th Cir.2006) (describing factors to consider in determining whether a fee constitutes a tax). Therefore, we agree with the district court that the Tax Injunction Act deprived it of jurisdiction to review the specific provisions of the telecommunications franchise agreements. *See id.*

4. The district court committed no error when it decided that the information services provided by TWT fell within the broad definition of "telecommunications system" in the franchise agreement. *See Bernard v. First Nat'l Bank of Oregon*, 275 Or. 145, 550 P.2d 1203, 1210 (1976) (holding that under Oregon law, contract terms are presumed to have been used "in their primary and general acceptation" absent evidence to the contrary).

5. Ruling without the benefit of *Sprint*, the district court erred in determining that TWT's in-kind requirements violated § 253 of the Federal Telecommunications Act. Under the standard adopted in *Sprint*, these requirements did not have the effect of prohibiting the provision of telecommunications services.

AFFIRMED IN PART AND REVERSED IN PART. EACH PARTY SHALL BEAR ITS COSTS ON APPEAL.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DATED MARCH 8, 2006

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

No. CV 04-1393-PA, CV 05-1386-PA.

TIME WARNER TELECOM OF OREGON, LLC, and Qwest Communications Corp.,

Plaintiffs,

v.

THE CITY OF PORTLAND,

Defendant.

Qwest Corp.,

Plaintiff,

v.

The City Of Portland,

Defendant.

Appendix B

March 8, 2006.

OPINION

PANNER, District Judge.

Plaintiffs Time Warner Telecom of Oregon (TWT), and Qwest Communications Corp. (QCC) sell telecommunications services in Oregon. Plaintiffs have franchise agreements with the City of Portland (the City) that permit plaintiffs to install and operate telecommunications systems in City streets.

In this action against the City, plaintiffs claim that their franchise agreements violate federal telecommunications law. Plaintiffs also claim that the City illegally competes with them by providing telecommunications services to other governments and public schools.

The parties move for summary judgment. I conclude that the Telecommunications Act of 1996, 47 U.S.C. § 253, preempts the in-kind compensation provisions in TWT's franchise agreement and the most-favored-rate provisions in both franchise agreements. Section 253 does not preempt other provisions of plaintiffs' franchise agreements, or the City's sales of telecommunications services to public schools and other governments.

Appendix B

BACKGROUND[1]

I. The City's Telecommunications Network

The City's fiber optic network, the Integrated Regional Network Enterprise (IRNE), provides the City with voice and Ethernet high-speed data transmission services. IRNE also sells Ethernet high-speed data transmission services to other governments and public schools in the Portland area.

In 2000, the City considered creating a fiber optic network that would provide Ethernet service, to increase speed, capacity, and security. In July 2001, the City received a certificate from the Oregon Public Utility Commission to operate as a competitive local exchange carrier, or CLEC. (Plaintiffs are also certified as CLECs in Oregon.) IRNE obtained a telecommunications franchise agreement with the City. However, IRNE is not a separate legal entity from the City.

Before creating IRNE, the City, working with the Oregon Department of Transportation and the Tri-Metropolitan Transportation District (Tri-Met), formed the Cooperative Telecommunications Infrastructure Committee (CTIC), through an intergovernmental agreement (also known as an IGA). The CTIC members

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1. Statements in the Background are based on the concise statements of facts and the supporting documents submitted in this action and in the companion case, *Qwest Corp. v. City of Portland*, Civ. No. 05-1386-PA.

share resources such as fiber optic cable to help build IRNE's fiber network. *See* Or.Rev.Stat. § 190.110(1) (statutory authorization for IGAs).[2]

The City initially invested about $11 million in IRNE. The City obtained IRNE's physical facilities from different sources. For the conduit and aerial runs connecting IRNE's nodes, 43% were built by the City; 38% were acquired through the City's membership in the CTIC; 5% were built by the City with other public entities; 3% were built by the City with private telecommunications providers; and 11% were obtained from "in-kind" contributions made by private telecommunications providers under permits or franchise agreements. By length, about 9% of IRNE's fiber runs through underground duct obtained through in-kind compensation from private carriers.

IRNE does not use any in-kind duct obtained from TWT, QCC, or Qwest Corp. (The City previously used

2. The statute provides:

> In performing a duty imposed upon it, in exercising a power conferred upon it or in administering a policy or program delegated to it, a unit of local government or a state agency of this state may cooperate for any lawful purpose, by agreement or otherwise, with a unit of local government or a state agency of this or another state, or with the United States, or with a United States governmental agency, or with an American Indian tribe or an agency of an American Indian tribe. This power includes power to provide jointly for administrative officers.

conduit from QCC but no longer does so.) As part of its franchise agreement with QCC, the City purchased conduit from QCC for $15,000, which the City used to transmit IRNE and traffic control signals over the Ross Island Bridge.

Plaintiffs contend that IRNE should be prohibited from providing Ethernet high-speed data transmission services[3] to any entity other than the City itself. IRNE began offering its services to non-City governmental customers in mid-2002. IRNE's governmental customers sign five-year intergovernmental agreements with the City, but there are no penalties for ending service before the agreement date. For a 100 megabits per second (mbps) Ethernet connection, a customer pays IRNE about $530 per month, plus installation and on-site equipment. (A DS-1 line, by contrast, runs at 1.5 mbps.)

Currently, IRNE serves Multnomah County, the State of Oregon, Portland Public Schools, the Port of Portland, the Multnomah Educational Service District, the Metropolitan Service District (Metro), the City of Sherwood, the City of Hillsboro, the City of Gresham, and the U.S. Army Corps of Engineers. IRNE links the State Office Building, Portland Public Schools, the Multnomah Educational Service District, and Metro to a central location where high-speed connections may be made to any internet service provider. IRNE connects

3. IRNE provides voice service to the City only, not to third parties.

Multnomah County and the Port of Portland to the 911 Emergency Center and to the Portland Police headquarters and Multnomah County offices.

IRNE does not provide telecommunications services to any non-governmental third parties. The City does not solicit sales for IRNE. Counsel for the City stated at oral argument that the City has no ***1091** plans ever to offer services to non-governmental entities.

IRNE's governmental customers have found that IRNE provides improved telecommunications services at a competitive price. IRNE allows participating government agencies to share critical information, such as law enforcement files, efficiently and securely.

The City states that it received about $83,000 in revenue from IRNE for the last fiscal year. Plaintiffs dispute that figure, contending that the City should include revenue from the Institutional Net or I-NET, which provides high-speed transmission services to local schools and government agencies. The I-Net is authorized by statute. *See* 47 U.S.C. § 531(b) & (f).

The City states that the cable company Comcast Corp. (Comcast) built and owns the I-Net. Comcast did not use any in-kind underground duct or intergovernmental fiber in constructing the I-Net. The City and Comcast agreed that the City will manage the I-Net, while Comcast owns and operates the network itself. According to the City, I-Net generated about $1.055 million in revenues for the last fiscal year, of which

$650,000 went to the City and $405,000 went to Comcast. I-Net customers pay about $554 per month for each primary port per location. Out of that monthly payment, the City receives $314 for management and maintenance services, while $240 goes to Comcast for transmission over its system.

The City states that IRNE's customers generally purchase either an IRNE connection or an I-Net connection. Only the Portland Public School District, the Multnomah Educational Services District, and Multnomah County purchase both IRNE and I-Net connections. The I-Net connects 89 schools for Portland Public Schools and 72 schools for the Multnomah Educational Service District.

I conclude that the City may properly exclude I-Net revenue from IRNE's gross revenues. However, even if the I-Net revenue should be included, that would not change my legal rulings.

II. The Telecommunications Market in Portland

Twenty-one telecommunications providers, including plaintiffs, sell services in the Portland area under City franchise agreements or permits. Some franchise agreements, including TWT's, permit ubiquitous access to the City's rights of way, while other agreements, including QCC's, authorize the use of specific routes.

Appendix B

The City has never denied a franchise application to provide telecommunications services. No potential telecommunications provider has ever withdrawn an application because of the proposed terms of a franchise agreement with the City.

A. Time Warner Telecom (TWT)

TWT sells telecommunications services in more than forty metropolitan areas across the United States. TWT owns and operates a telecommunications system in Portland.

According to the City, TWT had gross revenues of $2.2 million in fiscal year (FY) 2002-2003; $3.7 million in FY 2003-2004; and $4.6 million in FY 2004-2005. Under the franchise agreement, TWT paid the City fees equal to 5% of TWT's gross revenues: $110,225 in 2002-03; $183,579 in 2003-04; and $231,357 in 2004-05. TWT will neither confirm nor deny the accuracy of the City's figures because TWT uses a different fiscal year than the City.

TWT's franchise agreement requires that TWT provide the City with in-kind underground duct if requested. TWT has not provided any duct to the City.

B. Qwest Communications Corp. (QCC)

QCC entered the Portland market in the 1990s, providing long-distance services. QCC had no revenues in Oregon in 2001 and 2002. QCC's revenues for one

quarter of 2003 were $4.7 million, and its revenues for 2004 were $15.2 million. QCC does not track its revenue separately for the Portland metropolitan area.

QCC and the City entered into a franchise agreement in 1997 that gave QCC the right to run its facilities from the west end of the Ross Island Bridge to downtown Portland. QCC pays the City an annual fee per foot of use, adjusted for inflation. According to the City, the most recent fee was about $3 per foot, for a total of about $38,000.

STANDARDS

The court must grant summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). If the moving party shows that there are no genuine issues of material fact, the nonmoving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

DISCUSSION

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

1. Standing

The City contends that plaintiffs lack standing to challenge IRNE. To establish standing, plaintiffs must

show that they have suffered an injury in fact because of the City's conduct, and that the injury would be redressed by a decision in their favor. *See On the Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235, 1239 (9th Cir.2001). An injury in fact is " 'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.' " *Lee v. State of Oregon*, 107 F.3d 1382, 1387 (9th Cir.1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Plaintiffs also must satisfy "the prudential component of standing; that is, [their] 'complaint must "fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." ' " *On the Green Apartments*, 241 F.3d at 1239 (citations omitted).

Here, the City contends that even if this court grants plaintiffs the relief they seek, plaintiffs could not compete with IRNE. I conclude, however, that plaintiffs have made a sufficient showing of standing because they are within the zone of interests protected by § 253(a).

II. Preemption

A. Section 253(a)

Section 253(a) prohibits state and local governments from imposing regulations that could bar the provision of a telecommunications service:

> No State or local statute or regulation, or other State or local legal requirement, may

> prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

47 U.S.C. § 253(a). Section 253(a) preempts regulations that prohibit or *may* prohibit the provision of a telecommunications service. *See Qwest Communications Inc. v. City of Berkeley*, 433 F.3d 1253, 1256-57 (9th Cir.2006) (*City of Berkeley*). A regulation could violate § 253(a) even if the regulation has not actually prevented the provision of any telecommunications service. *See Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1241 (9th Cir.2004) (*City of Portland*), *cert. denied*, 544 U.S. 1049, 125 S.Ct. 2300, 161 L.Ed.2d 1089 (2005).

The court's analysis of a challenged regulation should not be completely divorced from economic reality. The court should consider a challenged regulation's actual economic effect on a carrier's ability to provide telecommunications services. As Magistrate Judge Ashmanskas noted in addressing a similar challenge, "what other benchmark would be used to determine whether a particular provision may have the effect of prohibiting a telecommunications provider from entering the market?" *City of Portland v. Electric Lightwave, Inc.*, 452 F.Supp.2d 1049, 2005 WL 4044333, *11 (D.Or. May 5, 2005) (*ELI*). I agree with Judge Ashmanskas that although a provider "is not required to make an actual showing that it is effectively prohibited from providing telecommunications services, it must at least demonstrate that the requirement is or

may be a 'barrier to entry into the City's telecommunications market.' " *ELI*, 452 F.Supp.2d at 1061, 2005 WL 4044333, *8 (quoting *City of Portland*, 385 F.3d at 1241).

If a plaintiff challenges more than one regulation, the court must consider the effect of the regulations both separately and in combination. *See City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1176 (9th Cir.2001) (*City of Auburn*). Plaintiffs bear the burden of showing that § 253(a) applies.

B. Safe Harbor under § 253(b) and (c)

If, and only if, a regulation violates § 253(a), the court must then determine whether the regulation could be rescued by the statute's safe harbor provisions, § 253(b) and (c).

1. Safe Harbor under § 253(b)

The parties dispute whether the safe harbor provision of § 253(b) could apply here. On its face, § 253(b) applies to state, rather than local, legal requirements:

> (b) State regulatory authority
>
> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and

> advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

The Tenth Circuit has held that § 253(b) applied to states and not to local governments. *See Southwestern Bell Wireless v. Johnson County Bd. of County Comm'rs,* 199 F.3d 1185, 1192 (10th Cir.1999). I conclude, however, that when "a state specifically delegated the state authority to its local governments," § 253(b) does apply to local governments. *Cox Commc'ns, PCS, L.P. v. City of San Marcos,* 204 F.Supp.2d 1260, 1264 (S.D.Cal.2002) (citation omitted).

Here, Portland City Charter gives the City, within its jurisdiction, the equivalent of the legislative powers of the State of Oregon. *See Sims v. Besaw's Café,* 165 Or.App. 180, 184-85, 997 P.2d 201, 203-04 (2000) (en banc). The State of Oregon allows cites to operate telephone systems: "When authorized by its charter . . . , a city may purchase, build, own, operate and maintain telephone or telegraph systems within or without its boundaries, for the benefit and use of its inhabitants at cost or for profit." Or.Rev.Stat. § 225.110. More generally, the State authorizes the City to own property for any "general benefit and use of the people within or without the city." Or.Rev.Stat. § 223.005(2). I conclude that the City is entitled to the protection of § 253(b).

2. Safe Harbor under § 253(c)

Section 253(c) provides:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

47 U.S.C. § 253(c). "This 'safe harbor' clause permits state and local government control over the use of the rights-of-way, so long as the control is management of the rights-of-way itself and not control of the telecommunications companies with facilities in the rights-of-way." *City of Berkeley*, 433 F.3d at 1256 (citing *City of Auburn*).

3. Safe Harbor Provisions as Affirmative Defenses

The Ninth Circuit has not determined whether the safe harbor provisions of § 253 create affirmative defenses, or whether the burden of proof remains on the plaintiff to show that § 253 applies. *Compare BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1187-88 (11th Cir.2001) (§ 253(c) is an affirmative defense); *Qwest v. City of Santa Fe*, 380

F.3d 1258, 1272 n. 10 (10th Cir.2004) (accord) *with Sprint Telephony PCS, L.P. v. County of San Diego*, 377 F.Supp.2d 886, 897 (S.D.Cal.2005) ("Consideration of section 253(c) is a necessary part of the preemption analysis, not a defense."). For this opinion, I assume that if plaintiffs show that a legal requirement violates § 253(a), the City then has the burden of showing that the requirement is rescued by § 253(b) or (c).

III. Applying § 253

A. The City's Operation of IRNE

Plaintiffs contend that the City exploits its power over the rights of way to compete illegally with private carriers in the market for governmental customers. Plaintiffs claim that the City's use of in-kind compensation from private carriers to create IRNE, and the City's intergovernmental agreement allowing the City to share resources with other governments, show that the City competes unfairly in operating IRNE. Plaintiffs contend that they cannot match the City's prices for telecommunications services because the City's expenses are artificially low.

The City responds that plaintiffs brought this action to stifle a successful competitor, using a statute that was enacted specifically to promote competition. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 125 S.Ct. 1453, 1455, 161 L.Ed.2d 316 (2005) (Congress enacted Telecommunications Act of 1996 "to promote competition and higher quality in American

telecommunications services and to 'encourage the rapid deployment of new telecommunications technologies.' ") (citation omitted). The City contends its use of City resources to create and operate IRNE are not "regulations" or "legal requirements" subject to preemption under § 253(a).

Before addressing the merits of plaintiffs' challenge to IRNE, it is important to note that the City is permitted to compete with private carriers in the market for telecommunications services. The Federal Communications Commission (FCC) has encouraged the "participation of municipally owned entities" in the telecommunications business [to] " 'further the goal of the 1996 Act to bring the benefits of competition to all Americans. . . .' " *Nixon v. Missouri Municipal League*, 541 U.S. 125, 131, 124 S.Ct. 1555, 158 L.Ed.2d 291 (2004) (citation omitted). The wisdom of permitting local governments to compete with private carriers is not at issue here.

Plaintiffs contend that § 253(a) preempts the City's operation of IRNE, including the City's inter-governmental agreements to share resources with the State of Oregon and other government entities. Plaintiffs contend that "private carriers, such as TWT and QCC, have been unable to compete against the City in the City's chosen key market-government educational institutions-because of the City's below market prices which the carriers themselves subsidized." Pls.' Mem. in Supp. at 41.

Appendix B

The problem with plaintiffs' preemption argument is that § 253(a) does not apply to IRNE. Section 253(a) preempts any "State or local statute or regulation, or other State or local legal requirement" that may have the effect of prohibiting the provision of a telecommunications service. Plaintiffs fail to show that IRNE regulates plaintiffs or imposes legal requirements on plaintiffs. Although the City used in-kind compensation to create IRNE, none of the in-kind compensation came from plaintiffs. *See Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1180 (9th Cir.2006) (*City of Surprise*) ("Qwest suffers no injury when its competitors are subjected to additional, costly requirements"). In any event, the in-kind compensation does not form a significant part of IRNE's network.

Plaintiffs also contend that the City's intergovernmental agreements violate § 253(a). I agree with the City that plaintiffs may not attack the intergovernmental agreements because the other parties to those agreements are not parties in these consolidated actions. Even if plaintiffs could challenge the intergovernmental agreements, plaintiffs have failed to show how the agreements may prohibit the provision of a telecommunications service. The agreements simply allow the governments to share their resources, just as private companies may enter joint ventures or partnerships.

Even if the City's operation of IRNE could be construed as a regulation or legal requirement subject to preemption under § 253(a), plaintiffs have not shown

that IRNE has prevented plaintiffs or other private carriers from providing any telecommunications services. Plaintiffs have not shown why the City's sales to other governments may have the effect of prohibiting the provision of a telecommunications service. As I understand plaintiffs' argument, plaintiffs contend that if a government customer chooses to purchase telecommunications services from IRNE, plaintiffs or other private carriers have been "prohibited" from providing a telecommunications service to that customer. However, the loss of a potential customer is not equivalent to a legal restriction preventing the provision of a telecommunications service. As the City points out, while plaintiffs challenge IRNE's prices as artificially low, plaintiffs do not attempt to show why their own prices are higher than IRNE's.

Plaintiffs also have not shown why governmental customers constitute a relevant market, rather than a small fraction of the Portland market as a whole. Plaintiffs seem to view IRNE as a competitive juggernaut against which they are hapless victims. However, I accept the testimony of the City's expert, Alan Pearce, who stated that IRNE is not significant in the Portland market, that IRNE has "no market power, no opportunity to monopolize, no opportunity to predatory price. . . . It can't behave anticompetitively because it isn't big enough or powerful enough. It doesn't have deep pockets." Pearce Dep., 260-61, *quoted in* City's Mem. in Opp. 18.

Appendix B

Plaintiffs seem to treat § 253 as an antitrust statute that targets only state and local governments. Plaintiffs argue that the City, because of its status as a local government, has unfair competitive advantages over private carriers. It's true that unlike private carriers, the City may enter into intergovernmental agreements to share resources with other governments. (Of course, as noted, private carriers may enter into similar arrangements with other private carriers.) The City controls the public rights of way, and has the authority to grant franchises. However, federal law allows local governments to compete with private carriers, even though most if not all local governments enjoy these potential competitive advantages. Also, as the City points out, private carriers have their own competitive advantages over local governments.

I agree with plaintiffs that a local government may face a conflict of interest when it competes with private carriers in the market for telecommunications services. For example, a local government could abuse its authority to grant franchises to benefit itself as a competitor. *See Nixon*, 541 U.S. at 131, 124 S.Ct. 1555 ("in a business substantially regulated at the state level, regulation can turn into a public provider's weapon against private competitors"). However, plaintiffs have not presented evidence of such conduct here.

Plaintiffs have not shown how the City's operation of IRNE "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." My conclusion

is limited to the particular circumstances here, in which the City is selling telecommunications services only to other governments and public schools, and not to any private parties.

Even if the City's operation of IRNE could be construed as violating § 253(a), IRNE would be rescued by § 253(b), one of the two safe harbor provisions. Under § 253(b), the City may impose "on a competitively neutral basis . . . requirements necessary to . . . protect the public safety and welfare."

IRNE links various government offices, including law enforcement and emergency services, using secure, high-speed technology. IRNE connects transportation agencies, allowing better traffic control and responses to emergencies. IRNE provides public schools with low cost, high-speed telecommunications services. These uses show that IRNE helps to protect "public safety and welfare." (The State of Oregon, through the Department of Transportation, benefits directly from IRNE.) Even if IRNE runs afoul of § 253(a), it is saved by § 253(b).

B. Applying § 253 to Plaintiffs' Franchise Agreements

Plaintiffs contend that § 253(a) preempts provisions of their franchise agreements with the City.

Appendix B

1. Franchise Provisions Are "Legal Requirements"

The City contends that § 253(a) does not apply to franchise agreements because the agreements are not "regulations" or "legal requirements," but contracts voluntarily executed by the parties. Plaintiffs respond that the City approves each franchise agreement through a City ordinance.

I conclude that a private carrier may challenge a franchise agreement under § 253. Otherwise, a local government might try to shield an onerous restriction from challenge by placing the restriction in the franchise agreement rather than imposing it through a regulation.

I also conclude that plaintiffs are not estopped from challenging the franchise agreements, and that section 19.9 of QCC's franchise agreement does not limit QCC to challenging only section 3.1 of its franchise agreement.

2. In-Kind Compensation Provisions

Plaintiffs challenge the provisions in their franchise agreements requiring them to make in-kind contributions to the City.

Appendix B

a. TWT's In-Kind Provisions

TWT's agreement provides:

> Section 9. USE OF NETWORK CAPACITY AND DUCTS BY CITY.
>
> 9.1 Upon written request from the City, Grantee shall provide conduit and/or lit optical fiber network connections to the City, for municipal purposes.
>
> 9.2 (A) *Ducts.* In the case of any new construction by the Grantee in the Streets, after prior notice to and upon written request from the City, Grantee shall install for the City one duct for each duct that Grantee installs, up to four ducts, or one single four-inch (4") duct, for municipal purposes. The cost of such ducts may not be deducted from Franchise fees payable to the City, or otherwise be charged to the City. Upon completing installation and construction of the ducts in the City Streets, Grantee shall submit to the City a deed or other form of ownership documentation for such ducts.

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(B)(1) *City Use of Surplus Ducts or Conduits.* The City may install or affix, and maintain wires and equipment for municipal purposes within any of Grantee's surplus ducts or conduits, as defined in Section 12.1(E). Grantee shall not be responsible for any damage resulting to the wires or property of the City occurring as a result of the City's use of Grantee's surplus ducts or conduits. The City shall not have access to Grantee's surplus ducts and conduits without Grantee's prior approval, except in the event of an emergency requiring that the City obtain immediate access to those conduits or ducts. In such an emergency, the City shall exercise its best efforts to notify the Grantee as soon as possible of the emergency and the City's need for immediate access. All work to attach, install, and/or maintain City wires and equipment in such surplus ducts shall be performed by Grantee, at City expense, at a charge not to exceed Grantee's direct incremental costs of material and labor plus ten percent (10%). Grantee's charges for attaching, install or maintaining such City wires and equipment may be

> deducted from Franchise fees payable to the City, or may otherwise be separately charged by the Grantee to the City.
>
> (2) The value of the City's use of Grantee's surplus conduits or ducts shall not be charged to the City, or be deducted from Grantee's Franchise fee, or other fees or charges payable to the City.

The TWT franchise agreement defines "municipal purposes" to exclude "(1) the sale or lease of telecommunications services to third parties; (2) the transfer of any rights by the City to third parties for the purpose of providing the City with access to interexchange carriers. . . ." TWT Franchise Agreement, § 9.4.

I conclude that the in-kind provisions of TWT's agreement are preempted by § 253(a). *See ELI*, 452 F.Supp.2d at 1064-65, 2005 WL 4044333, *11. The in-kind provisions are open-ended, requiring that TWT provide conduit or fiber optic network connections "[u]pon written request from the City." Because the in-kind provisions leave so much to the City's discretion, TWT cannot plan for the cost of providing in-kind compensation. The provisions are preempted even though, as in *ELI*, the City has not actually obtained any in-kind compensation from TWT.

I also conclude that the in-kind provisions in TWT's agreement are not rescued by § 253(c). A properly limited in-kind compensation provision could be considered to be "fair and reasonable compensation from telecommunications providers . . . for use of public rights-of-way." 47 U.S.C. § 253(c). However, the possible in-kind compensation the City may demand from TWT is not limited.

b. QCC's In-Kind Provisions

QCC's agreement provides:

> Section 9. CITY USE OF DUCTS.
>
> 9.1 *Ducts Provided to City in City Streets.* Grantee shall install for the City two two-inch ducts to be reserved for municipal purposes as part of Grantee's construction in City Streets as shown on the map attached to this Franchise as Exhibit A. Upon completing installation and construction of the two two-inch ducts in the City Streets, Grantee shall submit to the City a deed or other form of documentation indicating City ownership of such ducts.
>
> 9.2 *Ducts Provided to City Across Ross Island Bridge.* Grantee shall

> install two one and one-quarter inch ducts for the City across the Ross Island Bridge. In consideration for providing these ducts to the City, Grantee may take a one-time credit against the Franchise fees of up to Fifteen-thousand Dollars ($15,000) of Grantee's actual and direct material costs of providing the ducts to the City. Upon submitting documentation to the City that it is taking this credit against compensation paid, or to be paid, under Section 3.1 of this Franchise, Grantee shall also simultaneously submit to the City a deed or other form of ownership documentation for the ducts.

QCC's franchise agreement defines "municipal purpose" to exclude "the sale or lease of Telecommunications Services to third parties."

Unlike the in-kind provisions in TWT's agreement, the in-kind provisions in QCC's agreement are not open-ended. Instead, they are a one-time requirement. The in-kind provisions do not give the City broad discretion to require additional in-kind compensation.

Plaintiffs have not shown that in-kind compensation provisions are per se preempted. As the City notes, local governments for many years have used similar in-kind

compensation provisions in utility franchise agreements. I conclude that the in-kind provisions in QCC's franchise agreement do not run afoul of § 253(a). Even if the in-kind provisions did violate § 253(a), I would conclude that they are rescued by § 253(c) as reasonable compensation for use of the City's rights of way.

3. TWT's Franchise Fee Based on Gross Revenues

TWT's franchise agreement with the City requires that TWT pay annual fees based on 5% of TWT's gross revenues. The City places proceeds from the gross revenue fee in the City's general fund.

I conclude that this court lacks subject matter jurisdiction over TWT's challenge to the 5% gross revenue fee because the fee is a tax. Even if the gross revenue fee is subject to preemption, it survives as reasonable compensation for use of the City's rights of way.

a. The Gross Revenue Fee is a Tax

The Tax Injunction Act, 28 U.S.C. § 1341, forbids federal district courts from enjoining, suspending, or restraining "the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." To determine whether a particular charge is a tax, the court should consider "(1) the entity that imposes the charge; (2) the parties upon whom the charge is imposed; and (3) whether the charge is expended for general

public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed." *City of Surprise*, 434 F.3d at 1183 (citing *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 931 (9th Cir.1996)).

Applying the *Bidart* test, I conclude that the 5% gross revenue fee (regardless of its label) is a tax because the City places proceeds from the fee in its general fund. When "an ordinance requires that a telecommunications provider pay a percentage of its gross revenues to the municipality, and the revenue from that charge is directed to the municipality's general fund, the charge constitutes a tax." *City of Surprise*, 434 F.3d at 1184. If TWT's challenge to the gross revenue fee was successful, it would "reduce the flow of [City] tax revenue." *Id.* (citing *May Trucking Co. v. Oregon Dep't of Transp.*, 388 F.3d 1261, 1267 (9th Cir.2004)).

Even if the Tax Injunction Act did not deprive this court of subject matter jurisdiction, the Telecommunications Act itself provides that taxes are not subject to preemption. *See City of Surprise*, 434 F.3d at 1183 n. 3.

b. The Gross Revenue Fee Is Not Preempted

Even if the gross revenue fee is not a tax, it is not preempted by § 253. Plaintiffs have failed to show that the 5% fee may have the effect of prohibiting the provision of any telecommunications service. The record

indicates that there are more than twenty carriers in the Portland area, some of which are subject to the 5% gross revenue fee. *See ELI*, 452 F.Supp.2d at 1062, 2005 WL 4044333, *8 ("at least 13 other telecommunications companies are paying an identical 5% fee").

Even if the 5% fee could be considered to violate § 253(a), I agree with Judge Ashmanskas that the fee is rescued by § 253(c) because it is "fair and reasonable compensation" for TWT's use of the City's rights of way. *ELI*, 452 F.Supp.2d at 1068-75, 2005 WL 4044333, **15-22. I adopt Judge Ashmanskas's extensive and thoughtful analysis of this issue.

4. QCC's Franchise Fees Based on Usage

QCC's franchise agreement, at section 3.1, requires that QCC pay annual fees based on per-foot usage, adjusted for inflation. The most recent rate was about $3 per foot, which amounted to about $38,000 for the past year.

Plaintiffs contend that the fee provision violates § 253(a) because the fee is not tied to the actual cost of using the rights of way. I disagree. Plaintiffs have not shown that the $3 per foot fee may have the effect of prohibiting the provision of any telecommunications service. To put this issue in perspective, QCC paid the City a franchise fee of about $38,000 for the last fiscal year. In the most recent year for which figures are available, QCC earned more than $15 million in revenues from sales in the Portland area.

Second, even if the usage fee violates § 253(a), it is rescued by § 253(c), which allows cities "to require fair and reasonable compensation from telecommunications providers." The key word is "compensation." I conclude from the legislative history and the wording of the statute that "compensation" in this context is not limited to the actual cost of using the rights of way. Again, I adopt Judge Ashmanskas's well-reasoned analysis of this issue. *See ELI*, 452 F.Supp.2d at 1068-69, 2005 WL 4044333, *15.

Plaintiffs argue that the City charges carriers different fees for using the rights of way. Plaintiffs contend that Qwest Corp. pays 7% of exchange access revenue, which results in a fee that is less than 5% of Qwest Corp.'s gross revenues.

The City is not required to impose identical franchise fees on private carriers that use the City's rights of way differently. *See Cox Communications PCS, L.P. v. City of San Marcos*, 204 F.Supp.2d 1260, 1269-70 (S.D.Cal.2002). The City's agreement with Qwest Corp., the incumbent service provider, is different from its agreement with QCC, so there is a valid reason to treat the two carriers differently.

5. Most Favored Rate Provisions

Both franchise agreements contain provisions, found at section 3.2 of the agreements, that require the franchisee to provide telecommunications services to the City on request at the franchisee's "most favorable rate

offered at the time of the request charged to a similar user within Oregon for a similar volume of service. . . ."

Judge Ashmanskas concluded that a nearly identical "most-favored-rate" provision was preempted because "there are no restrictions on the extent or amount of services that may be required by the City. Rather, pursuant to section 3.2, it appears that ELI must be prepared at all times to provide the City with whatever service [it requests], at a most-favored rate." *ELI*, 452 F.Supp.2d at 1063, 2005 WL 4044333, *9.

I agree with Judge Ashmanskas that the most-favored-rate provisions at issue here allow the City too much leeway and therefore violate § 253(a). I also agree with Judge Ashmanskas that the most-favored-rate provisions are not saved by § 253(c) because the provisions are not sufficiently related to the City's management of its rights of way. *ELI*, 452 F.Supp.2d at 1068-69, 2005 WL 4044333, *15.

6. Non-Monetary Franchise Provisions

Plaintiffs challenge non-monetary franchise provisions and sections of the Portland City Charter and the Portland City Code.

Plaintiffs challenge section 16 of their franchise agreements, which gives the City discretion to revoke or amend the franchise; section 18, which gives the City discretion to renew a franchise; and section 1.3, requiring that the franchisee unconditionally accept terms of the franchise.

I conclude that the challenged non-fee requirements in plaintiffs' franchise agreements are not preempted. Franchise agreements are mutually binding contracts between the City and the franchisee. The City's discretion in enforcing these provisions is limited by the implied duty of good faith and fair dealing, which Oregon law implies in every contract. *See ELI*, 452 F.Supp.2d at 1065-66, 2005 WL 4044333, *12. As Judge Ashmanskas noted, the franchise agreements requires that the City and the franchisee comply with all applicable state and federal law. The City must comply with the Federal Telecommunications Act when it decides, for example, whether to renew a franchise (section 18).

None of the challenged non-fee provisions violates § 253(a). Section 16 of the franchise agreements includes monitoring, enforcement, and penalty provisions. Because the City may require a franchise agreement to use the City streets, it follows that the City is entitled to enforce the terms of the franchise agreement. Otherwise, a franchisee could breach a franchise agreement with impunity. Section 16 itself includes checks on the City's ability to apply it, such as a requirement that the City not impose forfeiture or penalties if there is a good faith dispute, and a requirement that the franchisee receive notice and an opportunity to cure the alleged breach.

Section 1.3 of the franchise agreements provides that the franchise agreement is effective only if the franchisee unconditionally accepts it within thirty days of its offer, and that the franchise is null and void if it is

not accepted. I agree with the City that this provision is in accord with black letter contract law, and is not a prohibition.

The challenged City Charter provisions include section 2-107, which allows the City to punish violations of a franchise agreement; and section 10-211, which allows the City to place "conditions or restrictions" in a franchise agreement. These general provisions do not violate § 253(a). The City Charter provisions were not adopted specifically for telecommunications providers. In *City of Portland*, the Ninth Circuit expressed doubt whether § 253 applied to regulations or legal requirements "that are not specific to the telecommunications process." 385 F.3d at 1242. I conclude that § 253(a) does not apply to these Charter provisions.

Even if the non-fee provisions violate § 253(a), they are rescued by the safe harbor provision of § 253(c) because they directly relate to the City's management of its rights of way. Section 1.3 requires that the franchisee execute the franchise agreement before the franchisee may occupy the City's streets. Section 16 sets remedies for breaches of the franchisee's obligations in using the streets. Section 18 sets procedures for the expiration of the franchisee's authorization to use the rights of way.

7. Severability

I conclude that the preempted provisions are severable from the franchise agreements. Both franchise agreements contain severability provisions. *See* TWT Franchise Agreement, § 20.2; QCC Franchise Agreement, § 19.2. I conclude that the preempted provisions are severable because the franchise agreements remain enforceable without those provisions. *See ELI*, 452 F.Supp.2d at 1075-76, 2005 WL 4044333, **22-23.

IV. Section 1983 Claim Based on § 253

Plaintiffs bring a claim under 42 U.S.C. § 1983 based on the City's violations of 47 U.S.C. § 253. I grant the City's motion for summary judgment on this claim.

The Ninth Circuit has not decided whether § 253 creates a private remedy under § 1983. In *Qwest v. City of Santa Fe*, 380 F.3d 1258, 1265-67 (10th Cir.2004) (*Santa Fe*), the Tenth Circuit held that neither the text nor the structure of 47 U.S.C. § 253 indicated an intent to create a private right of action under § 1983. The Tenth Circuit reasoned that "the language of the statute is not focused on the benefits granted to the telecommunications providers. Instead the statute focuses on restricting the type of telecommunications regulations a local authority may enforce." 380 F.3d at 1265.

I agree with the Tenth Circuit's reasoning in *Santa Fe* that § 253 should not be construed to create a private right of action under § 1983.

V. Commerce Clause Claim

Plaintiffs contend that the City's operation of IRNE violates the Commerce Clause of the U.S. Constitution. Plaintiffs argue that a regulation which incidentally affects interstate commerce runs afoul of the Commerce Clause if "the burden imposed upon such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970) (citation omitted). Plaintiffs argue that the City has created a monopoly over the market for government services.

Plaintiffs have failed to show that IRNE imposes an excessive burden on interstate commerce. As noted, IRNE commands only a fraction of the Portland market for telecommunications services. I grant the City's motion for summary judgment on plaintiffs' Commerce Clause claim.

VI. Other Claims

Plaintiffs also bring claims for a takings in violation of the Fifth Amendment, violations of due process, and unjust enrichment. I grant the City's motion for summary judgment on these claims.

Although I conclude that the in-kind provision in TWT's agreement and the most-favored-rate provisions in both agreements are preempted, neither plaintiff had property taken without due process as a result of these provisions. The City never tried to exercise its rights under the preempted provisions.

Given this court's rulings on plaintiffs' other claims, I grant summary judgment on plaintiffs' unjust enrichment claim.

THE CITY'S MOTION FOR SUMMARY JUDGMENT

The City seeks summary judgment on its counterclaims against TWT and QCC for alleged breaches of agreements with the City.

I. City's Claims Against TWT

The City contends that TWT has failed to pay all of the fees due under the franchise agreement. The franchise agreement requires that TWT pay the City a fee equal to 5% of TWT's gross revenues earned from telecommunication services in the City. The City contends that TWT is unilaterally excluding revenues that TWT earns from "information services." The City contends that these excluded services should be considered "telecommunication services" that are covered by the franchise agreement.

Appendix B

The franchise agreement provides that "gross revenues" are derived from "the provision of Telecommunications Services." TWT Franchise, § 3.1. The agreement defines "telecommunications services" in part as "[s]ervices interconnecting any entities, other than interexchange carriers, competitive carriers, or telephone companies providing local exchange services, for the purpose of voice, video, or data transmission." TWT Franchise, § 2.11(D). It also includes a catch-all definition: "Other telecommunications services as authorized by the Federal Communications Commission or the Oregon Public Utility Commission." *Id.*, § 2.11(F).

I conclude that material issues of fact preclude granting summary judgment on the City's counterclaim against TWT. The City has not shown as a matter of law that TWT breached the franchise agreement by *1103 excluding revenues from information services.

II. City's Claims Against QCC

The City contends that QCC breached three provisions of its franchise agreement with the City.

First, the City contends that under section 9.1 of the QCC franchise agreement, QCC was to build underground ducts for the City, and to provide the City with "a deed or other form of documentation indicating City ownership of such ducts." According to the City, QCC built the duct but never provided the City with deeds.

Appendix B

The City contends that section 9.2 of the franchise agreement with QCC required QCC to "install two ... ducts for the City across the Ross Island Bridge" and provide the City with a deed for the duct. According to the City, QCC constructed the duct but has not provided a deed.

The City also contends that QCC has denied the City access to ducts that it installed for the City across the Ross Island Bridge. The City states that QCC built two small ducts inside a QCC conduit.

I grant the City's motion for summary judgment on its counterclaims against QCC, while reserving the question of the amount of damages. Because I have concluded that the in-kind compensation provisions in QCC's franchise agreement are valid, QCC's failure to comply with those provisions breached the agreement.

CONCLUSION

Plaintiffs' motion for summary judgment (# 76) is granted as to the in-kind compensation provision in TWT's franchise agreement, and the most-favored-rate provisions in both franchise agreements, and otherwise denied. The City's motion for summary judgment (# 82) is granted, except as to TWT's in-kind provision and the most-favored-rate provisions, and the City's counterclaim against TWT.

The City's motion to strike (# 121) is denied as moot.

APPENDIX C — RELEVANT LOCAL LEGAL REQUIREMENTS

CITY OF PORTLAND ORDINANCE NO. 171566 [EXCERPTS]

Grant a franchise to GST Telecom Oregon, Inc. for a period of ten years.

The City of Portland ordains:

* * *

Section 3. COMPENSATION AND AUDITING.

3.1 *Amount of compensation.*

(A) As compensation for the benefits and privileges under this Franchise and in consideration of permission to use the Streets of the City, the Grantee shall pay as a Franchise fee to the City, through the duration of this Franchise, the greater of either: (a) the Minimum Annual Franchise Fee; or (b) an amount equal to five percent (5%) of the Grantee's Gross Revenues. However, revenues derived from the sale or lease of facilities and subject to Subsection 3.1(B), shall be excluded from the Gross Revenues calculation of franchise fees under this Subsection 3.1(A).

Appendix C

(B) As additional compensation to the amounts set forth in Subsection 3.1(A):

(1) In the event Grantee sells any portion of its Tele-communications System, Grantee shall pay a one-time Franchise fee to the City of one percent (1%) of the sales price; and,

(2) In the event Grantee leases any portion of its Tele-communications System, Grantee shall pay a Franchise fee to the City of one percent (1%) of the lease revenues.

(3) The calculations of the one percent franchise fee on sale and lease revenues shall be calculated under the following formula:

Franchise fee = (.01) X Ts X (Fp÷Ft), where:

Ts = Total sales price or periodic lease payments for the facility, expressed in Dollars/ fiber-miles;

Fp = the length of the facilities sold or leased, located within the

City, expressed in fiber-miles; and,

F't = the total length of the facilities sold, expressed in fiber-miles.

An illustrative example of this calculation would be as follows: Out of a fiber optic bundle of twenty four (24) fibers in a forty mile loop, Grantee sells two (2) fibers to a purchaser for a total sales price of five hundred thousand dollars ($500,000). Ten miles of the fiber optic loop are located with the City of Portland. The calculation would be as follows: Franchise fee = (.01) X $500,000 X (10÷40)) = $1,250.

* * *

Section 9. USE OF NETWORK CAPACITY AND DUCTS BY CITY.

9.1 Upon written request from the City, Grantee shall provide conduit and/or lit optical fiber network connections to the City, for municipal purposes.

Appendix C

PORTLAND CITY CHARTER [EXCERPTS]

Section 2-105 Continuation of Specific Powers.

The City of Portland by its Council has power and authority, subject to the provisions, limitations and restrictions contained in this Charter or in statute, to exercise any power or authority granted to the City by statute, general or special, or by this Charter, and may do any other act necessary or appropriate to carry out such authority, or exercise any other power implied by the specific power granted.

(a) Among such specific powers, the City has power and authority:

* * *

24. To provide or require conduits under the streets, lanes, alleys and public places of the City or any part or parts thereof for the use of telephone, telegraph, electric light and other wires, or for other purposes, either by constructing said conduits itself or authorizing or requiring their construction by others upon such terms and conditions as the Council may impose, and to regulate and control the use of such conduits, and to prescribe and establish reasonable rentals to be paid by any person or company using any of said conduits by whomsoever the same may be constructed for the use thereof, and to provide for the collection of such rentals, in addition to the ordinary processes, by such summary methods as it may deem proper. If any such grant be

made to any person, firm or corporation, such grantee shall not have power to sublet the same or the use of the same to any person, firm or corporation engaged in selling, hiring, leasing or otherwise receiving any income from the business or purpose for which it desires to use such conduits, without such person, firm or corporation first obtaining, as provided in this Charter, a franchise for such business, purpose or use.

Section 2-107 Punishment for Ordinance Violations.

The Council has power and authority, subject to the provisions, limitations and restrictions contained in this Charter, to provide for the punishment of a violation of any ordinance of the City by a fine or by imprisonment, or by both. Such imprisonment shall be for a term not exceeding six (6) months. In addition to the foregoing penalties, forfeiture of property or license of any kind may be provided. The limitations as to length of sentence contained in this Section shall not apply to any offense for which different limitations are fixed elsewhere in this Charter.

Section 10-207 Method of Granting.

Every franchise shall be embodied in an ordinance, which shall contain all the terms and conditions of the proposed grant, and shall be filed with the Auditor. Thereupon such proposed ordinance shall be published in full, once in the City official newspaper. There shall also be published, in a conspicuous place in such daily

newspaper of the City having a circulation in excess of fifteen thousand (15,000), as the Council may direct, a notice prepared by the Auditor, that an application has been made for a franchise, giving the name of the applicant, the character and location of the proposed grant, and requesting any person having any objections to such proposed franchise or any provisions thereof to file the same in writing with the Auditor within twenty (20) days from the first publication of such notice. If the request is made therefor, the Council shall fix a time for a hearing upon such objections and give reasonable notice of the time thereof and not less than five (5) days. All of such publications and notices shall be at the expense of the applicants for such franchises.

Such ordinances shall not come up for first reading until after the expiration of the said twenty (20) days.

If such ordinance shall be amended, it shall be republished in the City official newspaper in full as amended.

No such ordinance granting a franchise shall be put on final passage within thirty (30) days after the first reading nor within twenty (20) days after any amendment thereto, and the affirmative vote of four (4) Commissioners shall be required to pass the same.

Appendix C

Section 10-210 Conditions and Restrictions.

Every franchise granted by the City shall be subject to the conditions and restrictions hereinafter provided, to wit:

* * *

(d) No franchise shall be granted without fair compensation to the City therefor, either by way of direct payment or by reduction of rates, fares or charges, and in addition to the other forms of compensation to be therein provided, the grantee may be required to pay annually to the City such part of its gross receipts as may be fixed in the grant of said franchise. This provision shall not exempt the holder of the franchise from any lawful taxation upon its property nor from any license, charge or imposition not levied on account of such use.

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No. 09-309

Supreme Court, U.S.
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In the Supreme Court of the United States

tw telecom of oregon, llc

Petitioner,

v.

CITY OF PORTLAND

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT QWEST CORPORATION IN SUPPORT OF PETITIONER

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OCTOBER 13, 2009

QUESTIONS PRESENTED

1. Federal Court Jurisdiction over Federal Telecommunications Act Claims: The question presented is whether state and local right-of-way assessments imposed on telecommunications companies are indeed "fees" (as opposed to taxes) and therefore subject to federal jurisdiction, as every Court of Appeals that has addressed the issue—except the Ninth Circuit—has held.

2. Federal Preemption Under Section 253(a) of the Telecommunications Act: The question presented is whether section 253(a) prohibits state and local legal requirements that materially inhibit or limit a telecommunications provider's ability to compete in a fair and balanced legal and regulatory environment, as the FCC and every other Court of Appeals that has addressed the issue—except the Ninth Circuit—has held.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

tw telecom of oregon, llc (Petitioner here), City of Portland (Respondent here), Qwest Communications Corporation and Qwest Corporation, were the parties in the action being appealed from.

The parent company of Qwest Corporation is Qwest Services Corporation. The parent company of Qwest Services Corporation is Qwest Communications International Inc. No publicly-held company (other than Qwest Communications International Inc.) owns ten percent or more of the stock of Qwest Corporation or Qwest Services Corporation.

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Qwest Corporation was a co-plaintiff with tw telecom of oregon, llc ("TWT") in the District Court proceedings and a co-appellant with TWT before the Ninth Circuit. This Court's ruling will directly affect Qwest's ability to provide service to its customers in the City of Portland, in the State of Oregon, and throughout the nation. Qwest, therefore, submits this Brief of Respondent in Support of Petitioner.

SUMMARY OF THE ARGUMENT

The Ninth Circuit held that federal courts do not have jurisdiction to hear challenges to local right-of-way fees under the Telecom Act. Equally troubling, the court held that telecommunications companies are entitled to protections of section 253(a) of the federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "Telecom Act") only if a local regulation "ha[s] the effect of prohibiting the provision of telecommunications services" by preventing the provider's "continued operation." On both issues, the Ninth Circuit's opinion has created a circuit split that warrants this Court's review.

On the jurisdiction issue, the Ninth Circuit held that percentage-of-revenue-based right-of-way fees are "taxes" for purposes of the Tax Injunction Act and, as a result, denied federal courts of jurisdiction to hear challenges to such fees under the Telecom Act. This is contrary to the Fifth Circuit, which has ruled that gross-revenue-based franchise fees are not taxes but the price paid to rent use of public rights-of-way, and contrary to the First, Second, Sixth, Tenth, and Eleventh Circuits, which have exercised jurisdiction to hear challenges to local right-of-way fees.

On the section 253(a) issue, the Ninth Circuit held that a state or local regulation that does not expressly prohibit the provision of telecommunications services is preempted

only if it prevents a provider's "continued operation." Neither the FCC nor any other circuit has required a company to show it is unable to operate before applying the protections of the Telecom Act.

Review is also necessary for two other key reasons. First, the Ninth Circuit's ruling permits state and local governments to adopt any fee regulations whatsoever, as long as they denominate the fees as taxes. This will discourage and delay the development of telecommunications services and is contrary to the pro-competitive, deregulatory purposes of the Telecom Act. Second, without review, telecommunications companies will continue to be harmed by the Ninth Circuit's literal prohibition standard. This is exactly what the record in this case showed: both Qwest and TWT lost revenue, customers, and market share in Portland as a result of Portland's unlawful and oppressive regulatory scheme. Qwest respectfully requests that this Court grant review to prevent such harm.

ARGUMENT

I. The Ninth Circuit's Application of the Tax Injunction Act Has Created a Circuit Split and Denied Federal Courts of Jurisdiction to Rule on the Lawfulness of Local Right-of-Way Fees.

As petitioner points out, to provide services in Portland, private telecommunications carriers must enter into a franchise with the City. The franchise requires the payment of a recurring annual fee in exchange for use of the City's streets. Such fees vary broadly between carriers, with, for example, some carriers paying percentage-of-revenue-

based fees and others paying per-linear-foot charges.[1] The fees are specifically designated by Portland as fees for use of the rights-of-way.[2]

A. A Circuit Split Exists over Whether State and Local Right-of-Way Assessments Are Fees or Taxes.

The Ninth Circuit held that Portland's right-of-way fees are "taxes" for purposes of the Tax Injunction Act.[3] As a result, courts in the Ninth Circuit do not have jurisdiction to hear challenges to such local right-of-way fees under the Telecom Act. The Ninth Circuit stands alone nationally, and its ruling has created a split among the circuits.

Shortly after passage of the Telecom Act in 1996, the Fifth Circuit, when examining a 5% gross-revenue-based franchise fee, held that "[f]ranchise fees are not a tax . . . but essentially a form of rent: the price paid to rent use of public right-of-ways." *City of Dallas, Texas v. FCC*, 118 F.3d 393, 397 (5th Cir. 1997). Following the Fifth Circuit, numerous other circuits have exercised jurisdiction to hear challenges to local right-of-way fees under the Telecom Act. *See Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18-19 (1st Cir. 2006) (exercising

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[1] The below record cites are included in Qwest's Addendum and Excerpts of Record filed with the Ninth Circuit in *Time Warner Telecom of Oregon, LLC, et al. v. City of Portland*, Nos. 06-36023, 06-36024, 06-36061 (9th Cir. 2009) (hereinafter referred to as Qwest's Addendum, "ADD" and Excerpts of Record, "QER") and attached as Appendices hereto. *See* 1 ADD, QCC Franchise § 3.1(A), Appendix at 1a; 2 ADD, TWT Franchise § 3.1(A), Appendix at 1a; 3 ADD, IRNE Franchise § 3(A)(1)(b), Appendix at 2a; 8 ADD, QC Temporary Revocable Permit § c.1, Appendix at 2a.

[2] *See id.*

[3] *See* Memorandum of the United States Court of Appeals for the Ninth Circuit Filed on April 8, 2009, attached as Appendix A to Petitioner's Petition for Writ of Certiorari, ¶ 3.

jurisdiction and ruling that gross-revenue-based right-of-way fee violated section 253 because it would "negatively affect" the challenging entity's profitability by imposing a "substantial increase in costs"); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 79 (2d Cir. 2002) (exercising jurisdiction and finding unlawful under section 253 gross-revenue-based right-of-way fee that was applied discriminatorily); *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624-25 (6th Cir. 2000) (exercising jurisdiction and finding a 4% gross-revenue-based right-of-way fee lawful); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270-72 (10th Cir. 2004) (exercising jurisdiction and determining that substantial increases in right-of-way fees are unlawful under section 253 where they do not meet the stringent test under section 253(c)); *Bell South Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1180, 1186-92 (11th Cir. 2001) (exercising jurisdiction when considering gross-revenue fee under both state and federal law, and remanding case to district court for further consideration under section 253).

Even the Ninth Circuit, in a prior opinion, affirmed a district court order finding that fees "for use of the public right-of-way . . . essentially are rent for use of city-owned property [and] do not amount to taxes under the TIA." *Qwest Commc'ns Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1092 (N.D. Ca. 2001) (internal quotation marks and citations omitted), *aff'd*, 433 F.3d 1253 (9th Cir. 2006).

In short, every circuit, except the Ninth Circuit in its current opinion, has concluded that federal courts have jurisdiction to hear challenges to local right-of-way fees under the Telecom Act. The Ninth Circuit's conclusion to the contrary has denied telecommunications companies operating on the west coast access to federal courts and the protections of the Telecom Act.

B. Without Supreme Court Review, Federal Courts in the Ninth Circuit Will Be Unable to Enforce the Telecom Act as to Fee Challenges.

For 13 years federal courts have exercised jurisdiction to determine the lawfulness of right-of-way fees under the Telecom Act. It makes perfect sense that these courts have exercised this jurisdiction. Section 253 limits state and local governments to charging only compensatory fees in exchange for use of their rights-of-way that are fair, reasonable, competitively neutral, and non-discriminatory. *See* 47 U.S.C. § 253(c). These right-of-way fee limitations are a critical component of the Telecom Act. The Telecom Act's pro-competitive purposes are safeguarded by the limitations. *See* H.R. Rep. No. 104-458, at 113 (1996) (Conf. Rep.) (Telecom Act was designed to create a "pro-competitive, deregulatory national policy framework"). Such limitations also prevent prohibitory right-of-way pricing by local governments. The Ninth Circuit now stands alone as the only circuit that will not allow such challenges to be heard in a federal court. This ruling thus has the effect of carving the western region of the United States out of these important protections of federal jurisdiction.

II. By Limiting Section 253 Challenges Only to Laws or Ordinances That Literally Exclude a Carrier from Providing Service, the Ninth Circuit Has Created a Broad Circuit Split That Harms Companies in the Ninth Circuit.

A. A Circuit Split Exists over the Standard for Federal Preemption Under Section 253(a) of the Telecom Act.

In section 253 of the Telecom Act, Congress took regulation of telecommunications competition away from local government. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999). The deregulatory, pro-competitive purpose of the Telecom Act, as discussed above, explicitly "prohibits state and local regulation that impedes the provision of 'telecommunications service.'" *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 491 (2002) (citation omitted).

In accordance with the Telecom Act's purposes, the FCC has stated that section 253 preempts not just those regulations that literally prohibit a carrier from providing a service but also any legal requirement that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *In re California Payphone Assoc.*, 12 F.C.C.R. 14,191, 14,206, ¶ 31 (1997). In other words, a prohibition does not need to be complete or insurmountable to run afoul of section 253(a). *See, e.g., TCG New York*, 305 F.3d at 76 (interpreting and applying *California Payphone*). It is sufficient if a legal requirement materially interferes with a carrier's ability to compete. *See, e.g., Santa Fe*, 380 F.3d at 1271 (interpreting and applying *California Payphone*).

In its decision below, the Ninth Circuit expanded the FCC's preemption standard that it had previously adopted in its recent decision, *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (en banc), and held that a state or local regulation that does not expressly prohibit the provision of telecommunications services is preempted by 47 U.S.C. § 253(a) only if it results in a complete ban on the provision of services. Indeed, the Ninth Circuit expressly stated that "[t]he in-kind requirements that Qwest challenges . . . do not have the effect of prohibiting the provision of telecommunications

services, **as demonstrated by Qwest's continued operation**."[4] Thus, anything short of a complete ban passes muster under the Ninth Circuit's analysis.

The Ninth Circuit previously recognized, in the *Sprint Telephony* decision, that its interpretation of section 253(a) conflicted with the interpretations of several other circuits. *See Sprint Telephony*, 543 F.3d at 577. Specifically, the court stated that the First, Second, and Tenth Circuits adhere to a "broad[er] interpretation of § 253(a)." *Id.* Here, as applied to a complete factual record, that circuit split has grown even wider. No other circuit has required a company to show it is unable to operate before applying the protections of the Telecom Act. To the contrary, all other circuits to address the issue have held that such a literal prohibition is not required.

In *Puerto Rico Telephone*, for example, the First Circuit held that the relevant inquiry is whether "the [regulation] materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." 450 F.3d at 18 (internal quotation marks and citation omitted) (relying upon *California Payphone*, 12 F.C.C.R. at 14,206, ¶ 31). The First Circuit added that "a prohibition does not need to be complete or insurmountable to run afoul of § 253(a)." *Id.* (internal quotation marks and citation omitted). Applying that standard, the court invalidated a local ordinance that imposed a 5% fee on gross revenues from all telephone calls originating within the locality. *Id.* at 11-12, 23-24. The court reasoned that the ordinance would "negatively affect [the challenging provider's] profitability," give rise

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[4] *See* Memorandum of the United States Court of Appeals for the Ninth Circuit Filed on April 8, 2009, attached as Appendix A to Petitioner's Petition for Writ of Certiorari, ¶ 1 (emphasis added).

to "a substantial increase in [the provider's] cost," and "place a significant burden [on the provider]." *Id.* at 18-19.

Similarly, in *TCG New York*, the Second Circuit held that the test under section 253(a) is whether a regulation "'materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'" 305 F.3d at 76 (*quoting California Payphone*, 12 F.C.C.R. at 14,206, ¶ 31). Like the First Circuit, the Second Circuit noted that "a prohibition does not need to be complete or 'insurmountable' to run afoul of § 253(a)." *Id.* (citation omitted). The court proceeded to invalidate a local ordinance that subjected non-incumbent providers to a host of substantive and procedural requirements and pursuant to which the locality sought to impose a 5% gross-revenue fee on the challenging provider. *Id.* at 71-73, 82. The court concluded that the ordinance was preempted because it would pose "obstacles . . . to [the challenging provider's] ability to compete in [the locality] on a fair basis." *Id.* at 76-77.

The Eighth Circuit concluded that the provider "must show an existing material interference with the ability to compete in a fair and balanced market." *Level 3 Commc'ns, LLC v. City of St. Louis*, 477 F.3d 528, 531-33 (8th Cir. 2007) (*citing California Payphone*, 12 F.C.C.R. at 14,206, ¶ 31), *cert. denied*, 129 S. Ct. 2859 (2009). Importantly, the Eighth Circuit also recognized that a challenging provider "need not show a complete or insurmountable prohibition[,]" as the Ninth Circuit has required. *Id.*

Lastly, in *Santa Fe*, the Tenth Circuit held that the relevant inquiry under section 253(a) is whether a regulation "would 'materially inhibit' the provision of [telecommunications] services." 380 F.3d at 1271 (*quoting California Payphone*, 12 F.C.C.R. at 14,206, ¶ 31). The

court, like the First, Second, and Eighth Circuits, also observed that "an absolute bar on the provision of services is not required." *Id.* Applying that standard, the court invalidated a local ordinance that required providers to register with the locality and obtain lease agreements before using public rights-of-way. It focused on the fact that the ordinance contained a provision giving the locality "broad discretion in determining whether or not to accept a registration or lease application." *Id.* at 1270. The court reasoned that the provision would "den[y] telecommunications providers the 'fair and balanced legal and regulatory environment' the [Telecom Act] was designed to create" and that other provisions would "create a significant burden" and impose "substantial costs" on the challenging provider. *Id.* at 1270-71 (*quoting California Payphone*, 12 F.C.C.R. at 14,206, ¶ 31).

In short, there exists a clear split between the circuits on the applicable standard under section 253(a). This case has only broadened that circuit split, and left the largest circuit denying telecommunications companies the protections of the Telecom Act unless a local regulation will actually result in a company going out of business.

B. Without Supreme Court Review, Companies Operating in the Ninth Circuit Will Continue to Be Harmed.

A direct result of the Ninth Circuit's opinion is that telecommunications companies will lose customers, revenue, and market share. This is exactly what the record—which was fully developed—shows happening in this case. In order to obtain a franchise in Portland, as discussed above, the city demands payment of a recurring annual fee. *See supra* at 2-3. These fees, which are designated by Portland for the use of the rights-of-way, vary dramatically between carriers. *See id.* The record also

shows that Portland's Charter gives it the right to demand conduit or fiber in exchange for a franchise. The City generally exercises this authority without fail, making such donations to the City a condition of obtaining a franchise.[5] The only franchise without such an in-kind requirement is the one the City granted to its own carrier, IRNE. IRNE is not required to build or contribute any in-kind facilities. Like the fees, the record shows that the City demands widely divergent in-kind compensation from the carriers.[6] The City then donates to IRNE the in-kind facilities demanded from franchisee carriers.[7] The City admits that IRNE's prices are substantially reduced because it does not have to recover the costs of the in-kind assets in its prices.[8] IRNE's prices are approximately 50% below what they would be if IRNE were realizing its actual costs.[9]

Under the Ninth Circuit's present ruling, federal courts do not even have jurisdiction to determine whether the fees are unlawful. And yet, Qwest has lost established customers to IRNE, including Portland Public Schools, Port of Portland, Multnomah County, Multnomah Educational School District, and Metro.[10] The record showed that each of these customers identified pricing as a reason for the switch to IRNE. The loss of these customers alone amounts to approximately 11% of Qwest's annual revenue in the government and education markets in the Portland

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[5] *See* 9 QER (Soloos Depo. I) at 30:6-14, Appendix at 2a; 9 ADD (Charter) § 2-105(a)(24), Appendix at 3a; 10 ADD (Charter) § 10-210(d) (emphasis added), Appendix at 4a.

[6] *See* 12 QER (Olson Depo. I, Ex. 55) at 000083, Appendix at 8a.

[7] 13 QER (Jesuale Depo., Ex. 92) at 000085, Appendix at 5a.

[8] 30 QER (Gray Depo. II) at 52:3-23, Appendix at 6a.

[9] *See* 8 QER (Olson Depo. I) at 86:1-13, Appendix at 6a; 35 QER (Fitzsimmons Decl.) ¶¶ 6, 7, 12, 13, not included in Appendix due to being filed under seal; 32 QER (Jesuale email), Appendix at 7a.

[10] *See* 34 QER (Stepan Decl.) ¶¶ 8-10 & Ex. A, not included in Appendix due to being filed under seal.

area.[11] The record also shows that TWT has lost business and been unable to compete against IRNE because of IRNE's artificially low rates.[12] Carriers will continue to lose customers, revenue, and market share if this Court does not grant certiorari and resolve the matter.

C. This Case Satisfies the Concerns Set out in the Solicitor General's Amicus Curiae Brief in the Sprint Telephony Matter.

In the *Sprint Telephony* matter, filed earlier this year, the Solicitor General submitted an amicus brief. *See* Brief for the United States as Amicus Curiae, *Level 3 Commc'ns, LLC v. City of St. Louis*, Nos. 08-626, 08-759, 2009 WL 1497821 (U.S. May 28, 2009). The Solicitor General acknowledged that there was a circuit conflict concerning the interpretation of section 253(a), *id.* at *15 ("The Eighth and Ninth Circuits correctly recognized that their view of the Section 253(a) preemption standard differs in some respects from that of First, Second, and Tenth Circuits."), but suggested that review should not be granted because the *Sprint Telephony* case was based on a facial challenge, *id.* at *9. Here, the record below was fully developed in the District Court and shows that Qwest is losing customers, revenue, and a substantial market share as a result of the City of Portland's regulations. *See supra* at 9-11. The evidence also shows that TWT is losing customers and revenue. *See id.* Thus, the record that was purportedly absent in *Sprint Telephony* exists in this case, underscoring the propriety of granting TWT's petition.

Lastly, the FCC's decision in *California Payphone* does not resolve the confusion, as the Solicitor General

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[11] *See id.*

[12] *See* 20 QER (Nicholson Decl.) ¶ 6, not included in Appendix due to being filed under seal.

suspected it might not. *See Level 3 Commc'ns*, 2009 WL 1497821, at *14 ("Portions of the Ninth Circuit's decision . . . could be read to suggest that a Section 253 plaintiff must show effective preclusion—rather than simply material interference—in order to prevail[,]" and if so, the resulting legal standard "would frustrate the policy of open competition that Section 253 was intended to promote."). To be sure, each of the circuits references and relies upon the FCC's decision. Even so, the circuits widely diverge in the interpretation and application of the standard. The First, Second, Eighth, and Tenth Circuits have acknowledged that any regulation that materially inhibits or materially interferes with the provision of services violates section 253(a), as the FCC stated. *See supra* at 5-9. The Ninth Circuit, on the other hand, now requires regulations that literally prohibit the provision of services. *See id.* In other words, the FCC's ruling has not cleared up the circuit split to any degree, again underscoring the need for this Court's review.

CONCLUSION

For the foregoing reasons, Qwest respectfully requests that the Court grant TWT's petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

QCC Franchise § 3.1(A)
ORDINANCE NO. 171914

Section 3. COMPENSATION AND AUDITING.

3.1 *Amount of compensation.*

(A) As compensation for the benefits and privileges under this Franchise, and in consideration of permission to use the Streets of the City, the Grantee shall pay as a franchise fee to the City, through the duration of this Franchise, an amount equal to the greater of the Minimum Annual Franchise Fee or $2.63 per linear foot of Grantee's Telecommunications System in the Streets. The total number of linear feet of Grantee's Telecommunications System located in the Streets shall be determined by the as-built maps submitted by the Grantee, and approved by the City Engineer, as provided in Section 6.1(B).

TWT Franchise § 3.1(A)
ORDINANCE NO. 171566

Section 3. COMPENSATION AND AUDITING.

3.1 *Amount of compensation.*

(A) As compensation for the benefits and privileges under this Franchise and in consideration of permission to use the Streets of the City, the Grantee shall pay as a Franchise fee to the City, through the duration of this Franchise, the greater of either: (a) the Minimum Annual Franchise Fee; or, (b) an amount equal to five percent (5%) of the Grantee's Gross Revenues. However, revenues derived from the sale or lease of facilities and subject to Subsection 3.1(B), shall be excluded from the Gross Revenues calculation of franchise fees under this Subsection 3.1(A).

IRNE Franchise § 3(A)(1)(b)
ORDINANCE NO. 177348

Section 3. COMPENSATION AND AUDITING.

A. *Amount of compensation.*

1.b. An amount equal to five percent (5%) of IRNE's Gross Revenues. However, revenues derived from the sale, lease or IRU of facilities and subject to Section 3(A)(2) shall be excluded from the Gross Revenues calculation of franchise fees under this Subsection.

QC Temporary Revocable Permit § c.1
SUBSTITUTE
ORDINANCE NO. 175757

c. COMPENSATION AND AUDITING.

1. *Amount of compensation.* As compensation for the benefits and privileges under this Permit and in consideration of permission to use the Streets of the City, Qwest shall pay as a Permit fee to the City, throughout the duration of this Permit, an amount equal to seven percent (7%) of Qwest's Gross Revenues.

David R. Soloos June 17, 2005 Deposition
Excerpts at 30:6-14

Q. Okay. I think I'm stating your answer correctly because I believe earlier you testified that, you know, when it comes to in-kind compensation, the City has not, as far as you're aware, ever negotiated away that as a part of compensation.

A. We've negotiated it. It's changed occasionally from franchise to franchise, but I don't sit here and recall any instance that that provision has been removed.

PORTLAND CITY CHARTER [EXCERPTS]

Portland City Charter § 2-105(a)(24)

SECTION 2-105 CONTINUATION OF SPECIFIC POWERS.

The City of Portland by its Council has power and authority, subject to the provisions, limitations, and restrictions contained in this Charter or in statute, to exercise any power or authority granted to the City by statute, general or special, or by this Charter, and may do any other act necessary or appropriate to carry out such authority, or exercise any other power implied by the specific power granted.

(a) Among such specific powers, the City has power and authority:

24. To provide or require conduits under the streets, lanes, alleys and public places of the City or any part or parts thereof for the use of telephone, telegraph, electric light and other wires, or for other purposes, either by constructing said conduits itself or authorizing or requiring their construction by others upon such terms and conditions as the Council may impose, and to regulate and control the use of such conduits, and to prescribe and establish reasonable rentals to be paid by any person or company using any of said conduits by whomsoever the same may be constructed for the use thereof, and to provide for the collection of such rentals, in addition to the ordinary processes, by such summary methods as it may deem proper. If any such grant be made to any person, firm or corporation, such grantee shall not have power to sublet the same or the use of the same to any person, firm or corporation engaged in selling, hiring, leasing or otherwise

receiving any income from the business or purpose for which it desires to use such conduits, without such person, firm or corporation first obtaining, as provided in this Charter, a franchise for such business, purpose or use.

Portland City Charter § 10-210(d)

Section 10-210. CONDITIONS AND RESTRICTIONS.

(d) No franchise shall be granted without fair compensation to the City therefor, either by way of direct payment or by reduction of rates, fares, or charges, and in addition to the other forms of compensation to be therein provided, the grantee may be required to pay annually to the City such part of its gross receipts as may be fixed in the grant of said franchise. This provision shall not exempt the holder of the franchise from any lawful taxation upon its property nor from any license, charge or imposition not levied on account of such use.

Nancy Jesuale Dep. (Ex. 92 at 000085)

4. *Where is the city getting the money to put IRNE in place?*

The city has the franchising authority over the rights-of-way for telecommunications and public utilities. Over the years, we've been requiring any telecommunications carrier who wants to place conduit in our streets for their network to build additional conduit for the City as a condition of receiving a franchise and permit. We had collected these empty conduit runs all over the city, and the Cable and Franchise office was very interested in seeing them put to use. We began designing a fiber plant that would take advantage of those conduit resources and create a wide-area network or a metropolitan area network for use by the city. As we started to do that, we realized we should collaborate with other public sector agencies because in some places we had conduit where they needed it and in other places they had fiber where we needed it.

Another significant financial outcome of this project will be the ability to leverage millions of dollars of network assets regionally, networks that otherwise would develop independently without coordination. The implementation of the fully realized network is estimated to save all local governments in the region millions of dollars in networking cost to the users over leased alternatives. Preliminary analysis indicated that the City of Portland alone can expect to eliminate nearly 95% of its leased data circuits, while increasing bandwidth per site an average of 500%. This can be done in a cost neutral financial package where no new money is necessary.

Mark Gray January 18, 2006
Deposition Excerpt at 52:3-23

Q. Understood. What I was asking you about is the capital costs of in kind contributed assets. IRNE had no cost of acquisition of those assets; correct?
A. Correct.
Q. And it has no liability or expense in its operating budget for those assets; correct?
A. I don't understand your use of the word liability. But there is no reoccurring cost for the use of those assets.
Q. Right. In other words, it's paying nothing for those in kind capital assets?
A. Correct.
Q. And so the pricing in the cost recovery that's associated with the pricing does not take into account the in kind contributed assets?
A. The acquisition of them, correct.
Q. Okay. And it also doesn't take in account the assets that IRNE utilizes from CTIC?
A. It does not take into consideration the acquisition of those assets.

David C. Olson April 5, 2005
Deposition Excerpts at 86:1-13

Q. Okay. Now let me ask you, if you could, turn to page 92 marked at the bottom. Under "Recommended Utilization of Franchise Assets," could you read the first paragraph under that heading, please?
A. "Franchise assets available to the City are extremely valuable. As an example, the City has empty duct available, which requires that fiber be pulled through the duct at a cost of approximately $2 per foot. In comparison, placing duct alone can cost from $35 to $100 per foot."
Q. Okay. Do you have any reason to disagree with that statement?
A. No.

Nancy Jesuale
February 28, 2002 email

Smith, Ralph

From:	Jesuale, Nancy
Sent:	Thursday, February 28, 2002 9:38 AM
To:	Grewe, Tim
Cc:	Feely, Tom (OMF); Smith, Ralph; Ayres, Nancy; Walters, Ben; Norm Peterson (E-mail); Jim Deason (E-mail); Olson, David
Subject:	IRNE Advisory Board Meeting Feb 27

Yesterday we had our first advisory board meeting, which was extremely successful. IRNE Partners in attendance included Portland Community College, Multnomah County, David Douglas School District, Multnomah Educational School District, METRO. We reviewed some "price points" for IRNE services, although I let them know that the rates were still under review.

The result of the meeting will be several IRNE service orders—telephone service for David Douglas, several fiber circuits for Multnomah County, and a fiber build into MESD headquarters. Very very successful meeting.

We will formalize pricing and file with the OPUC within two weeks. Our pricing is 20-40% below Qwest and AT&T and you can expect a hailstorm of backlash when they figure that out. I am thinking about how best to cover for that.

David C. Olson Depo. I. (Ex. 55 at 000083)

CLEC'S

Company	?	Date	Category of Data	Approx Footage (feet)
ELI		7/29/1998	Informally Provided	75,153
Enron	x	9/1/2000	Partial As-Builts	2,500
Firstpoint (Enron)	x	7/29/1998	Informally Provided	126,428
FirstWorld	x		No Data	
GST		7/29/1998	Informally Provided	261,594
Level3			No Data	
MCI		7/29/1998	Informally Provided	24,746
Wcom / MFS		7/29/1998	Informally Provided	12,606
TCG/AT&T LNS	x		No Data	
Metromedia		6/23/2000	Proposed Construction Prints	120,000
McLeodUSA		4/17/2000	Proposed Construction Prints	250,000
Nextlink (XO)		3/1/2000	Proposed Construction Prints	250,000
All Phase		12/1/2000	Proposed Construction Prints	250,000
Sigma Networks			No Data	
Point-To-Point				
AT&T		7/29/1998	Informally Provided	18,769
FTV			No Data	
IXC			No Data	
Pacific Fiber Link (360 networks)		12/1/2000	As Builts	92,603
Pacific Telecom Cable (PTI)		7/29/1998	Informally Provided	2,033
Qwest (pre USWest)		7/29/1998	Informally Provided	16,327
Sprint		7/29/1998	Informally Provided	8,496
WCI			No Data	
Wcom / MFS		7/29/1998	Informally Provided	12,606
Broadwing			No Data	
Williams Comm			No Data	
Adelphia			No Data	
Global Crossing			No Data	
Portland General Broadband			No Data	
Tyco			No Data	
UNI			No Data	

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(3)

No. 09-309

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In The

Supreme Court of the United States

tw telecom of oregon llc,

Petitioner,

v.

City of Portland, Oregon,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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Petitioner, tw telecom of oregon (TWT), asks this Court to review an unpublished decision by the Ninth Circuit Court of Appeals. In its decision, the circuit court declined to apply the Telecommunications Act of 1996, 47 U.S.C. §253, to preempt the City of Portland's (City or Portland) operation of a governmental telecommunications system or to preempt a street-use franchise between TWT and Portland. Under the franchise, TWT is granted use of all City streets for its telecommunications facilities. In return, it pays the City a "franchise fee" and has certain other obligations.

The district court decided the matter on cross-motions for summary judgment on the basis of undisputed facts identified by the district judge and discussed in some detail in the district court opinions. The record was substantial and included declarations from 22 fact witnesses, six experts, and nearly 1,700 pages of exhibits.[1] The Court of Appeals issued its unpublished opinion, affirming in part and reversing

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[1] The district court issued two opinions in the case. One is attached to TWT's petition as Appendix B. *Time Warner Telecom of Oregon v. City of Portland*, 452 F. Supp. 2d 1084 (D. Or. 2006). The second opinion is found in the appendix to this response in opposition. 452 F. Supp. 2d 1103 (D. Or. 2006). Additionally, the district judge adopted by reference the Oregon district court's analysis in another very similar franchise preemption case, *City of Portland v. Electric Lightwave, Inc.*, 452 F. Supp. 2d 1049 (D. Or. 2005). In what follows, the City will also cite to parts of the appellate court's record, including the Qwest Excerpt of Record (QER), the City's Supplemental Excerpt of Record (SER), and the Appellants' Addendum (ADD).

in part, on April 8, 2009. 2009 WL 965816. Petitioner's Appendix 1a-5a.

The Court should deny the petition for certiorari. The Ninth Circuit opinion neither creates a conflict among the circuit courts nor otherwise raises significant legal issues. In addition, TWT's petition (along with the brief of amicus Qwest Corporation) misrepresents the record below. In doing so, it evidently seeks to obscure the real nature of the case and the lower court opinions. The district court largely found against TWT, on undisputed facts developed from a substantial record, using a legal standard proposed by TWT itself. After months of litigation, the district court concluded that the undisputed facts could not support TWT's claim that the City's actions "prohibited" or even "may prohibit" TWT from providing telecommunications in the local market. The Ninth Circuit's unpublished memorandum opinion does nothing more than apply to the same facts a preemption test that is (a) consistent with the standards under the Telecommunications Act announced by the Federal Communications Commission; (b) consistent with the rules applied by all the other circuits; and (c) identical to the standards this Court declined to review last term in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 2860 (2009). Further, the Ninth Circuit interpretation of the Tax Injunction Act (TIA) to foreclose a federal court challenge to the City's franchise fee is similar to that of all other circuit courts that have addressed the question.

I. INTRODUCTION, SUMMARY OF PROCEEDINGS BELOW

TWT and another telecommunications firm, Qwest Communications Corporation (QCC), sued Portland, Oregon, under the Telecommunications Act of 1996, 47 U.S.C. §253. In their suit, they sought preemption of certain provisions in their own street use franchises, parts of the franchises of 19 other communications providers, who were not parties to the case, and contracts between the City and other governmental agencies for the sharing of telecommunications facilities. They also challenged the arrangements under which the City provides communications to other local governments and schools, both through its own fiber-optic system and in cooperation with the local cable company, Comcast Corporation. Qwest Corporation (Qwest), an affiliate of QCC, joined the case a year after it was filed. Neither Comcast nor the other governments were named as defendants.

The district court ruled early that plaintiffs could not seek to preempt the City's contracts with third parties unless they were brought into the case. The plaintiffs declined to join those other parties. Nonetheless, plaintiffs continued to criticize contracts held by non-parties, pressed for the "preemption" of the City's use of franchise compensation from non-parties, and attacked City operation of its own communications system and its contractual arrangements with Comcast.

In the end, TWT's central §253 claims against the City were: (1) The City's 5% gross revenue franchise fee should be preempted under §253 because it prohibits TWT from providing telecommunications services, even though TWT operates successfully in the Portland market and merely passes the 5% fee on to its customers; (2) The provision of the City-TWT franchise under which TWT may be required to provide "in-kind" compensation (in the form of extra underground duct work for City use) prohibits TWT from providing telecommunications, even though the City had never asked for and TWT had never provided any in-kind duct to the City; (3) City operation of its own communications network (known as IRNE), built using some in-kind duct provided by other companies, but not TWT, to provide data transmission services to other governmental entities prohibits TWT from providing telecommunications services because the entities obtaining less expensive services from the City were not buying more expensive TWT services; (4) City agreements with the local cable television company, Comcast, jointly to operate an "institutional network" owned by Comcast (known as the INET) to provide communications services to other governments (arrangements expressly permitted by the Cable Communications Act of 1984, 47 U.S.C. §§531, 544), prohibit TWT from providing telecommunications services to those governmental entities who choose to use that network rather than TWT's.

In ruling on the preemption claims before it, the district court applied the broad standards laid down by the Ninth Circuit in the case of *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002), *overruled by Sprint Telephony PSC, L.P. v. County of San Diego*, *supra*. In *Auburn*, the Ninth Circuit held that local legal requirements should be preempted under §253 if they "prohibit or *may prohibit*" the provision of telecommunications services by any entity. Put simply, the district court found that the undisputed facts could not even support plaintiffs' claim that they "may be prohibited" from offering telecommunications by anything the City did.

On the issue of TWT's contractual obligations, including the 5% franchise fee, the district court concluded that those obligations did not adversely affect TWT's ability to operate or even that the obligations "may have the effect of prohibiting the provision of . . . telecommunications." Petitioner's Appendix 33a. The district court noted, for instance, that TWT's revenues in the City had doubled in the first two years it operated in Portland. Petitioner's Appendix 13a. In the same two years, Portland had become one of TWT's top ten urban telecommunications markets. SER 024-025, 052-056. TWT presented no evidence that paying a franchise fee made its operations "uneconomic and impractical," *In re Cal. Payphone Ass'n*, 12 F.C.C.R. 14,191, 14,209 (1997), that the fees caused a "massive increase in [the firm's] costs," *Qwest Corp. v. City of Santa Fe, New Mexico*,

380 F.3d 1258, 1271 (10th Cir. 2004), or that the fees would reduce TWT's profits by a "substantial" or "significant" amount. *Puerto Rico Tel. Co., Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 18-19 (1st Cir. 2006).[2] Finally, and in any case, based on the extensive record, including expert economic testimony, the district court found that the City's franchise fees were "fair and reasonable compensation" for use of the rights-of-ways. Petitioner's Appendix 34a.

In response to TWT's challenge to how the City used the City's own property, operated the City's own telecommunications system, and worked with the local cable company, the district court held that such actions were not "local statute[s] or regulation[s] or other . . . legal requirements" subject to review and preemption under §253. Further, even assuming that such non-regulatory actions were subject to preemption review, the district court concluded that none of the City's actions prohibited or may prohibit TWT from providing telecommunications services. The winning and losing of particular customers, it held, is competition, not a legal prohibition. Petitioner's Appendix 23a.[3] Finally, and in any case, even if

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[2] Dr. Alan Pearce conducted a study of the telecommunications markets in eight comparably sized cities, including Portland. He testified that Portland's was one of the most robust and competitive markets and that "competitive entry has been enabled by the city's pro-competitive policies." SER 221.

[3] The FCC has said essentially the same thing in a slightly different context. *In re Amigo.Net*, 17 F.C.C.R. 10,964, 10,967-68 (2002) (governmental contracting decisions benefitting one

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market competition by a local government can somehow be transformed into an action subject to preemption, the district court simply found that the undisputed facts did not support TWT's claims. To the contrary, the district judge:

> accept[ed] the testimony of the City's expert Alan Pearce who stated that IRNE [the City telecommunications operation] is not significant in the market, the IRNE has "no market power, no opportunity to monopolize, no opportunity to predatory price. . . . It can't behave anticompetitively because it isn't big enough or powerful enough."

Petitioner's Appendix 23a.

The district court did, nonetheless, preempt one part of the TWT franchise under the *Auburn* "may prohibit" test. That was the provision under which the City may require that TWT pay part of its compensation in-kind by providing underground ducts for City use. The City has never requested, and TWT has never provided, any duct to the City pursuant to this contract clause. The district court could find no existing impact on TWT of its in-kind obligations but felt constrained to preempt the requirements under

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telecommunication over another are not subject to §253 preemption). The district court's opinion is also consistent with this Court's decisions interpreting laws designed to promote competition. *E.g., Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) (allegations of loss of customers or market share not enough to state a claim under antitrust laws).

the broad "may prohibit" test from the *Auburn* case. That case had been read to preempt requirements that granted local governments "unfettered discretion." The district court held that the City's ability to ask for duct in the future, at its discretion, constituted a "prohibition" under *Auburn*.

In the Court of Appeals, TWT never openly challenged the district court's determination of the undisputed facts. Nor has it ever suggested that the district court should have held a trial rather than grant summary judgment or that the case should be remanded to the district court for additional fact finding. Instead, in the Court of Appeals and now before this Court, TWT simply ignores the undisputed facts the district court found material and repeatedly presents as "facts" immaterial snippets from the record that *were* disputed and which the district court did not accept for purposes of its decision. By doing so, TWT evidently hopes to avoid confronting a fundamental reality of this case: the district court rejected the bulk of TWT's claims, based on its determination of undisputed facts, under the very legal test TWT urged upon it, the lenient "may prohibit" test from *Auburn*.

Pending appeal of TWT's case, however, the Ninth Circuit abandoned the *Auburn* test and adopted the more stringent standards enunciated in *Sprint Telephony v. San Diego County, supra*. Having lost in the district court relying on *Auburn's* easy preemption test, TWT could not prevail on appeal under the stricter preemption rules laid down in *Sprint*

Telephony. If TWT failed to convince the district court that Portland's actions "may prohibit" provision of telecommunications services, *a fortiori*, the Court of Appeals could not find, on the same record, that the City's actions worked an "actual or effective prohibition." Similarly, once the "may prohibit" test no longer applied, TWT could not show that an *unimplemented* franchise provision under which the City might someday ask for in-kind conduit prohibited or effectively prohibited it from offering telecommunications.

In addition, the Ninth Circuit declined jurisdiction over TWT's challenge to the City's franchise fee, relying on the Tax Injunction Act. 28 U.S.C. §1341. Applying a test for what constitutes a "tax" under the TIA used by all circuits that have addressed the question, the Ninth Circuit decided that the City's franchise fee was a "tax," protected by the TIA from federal court review.

This Court should decline review of the Ninth Circuit's unpublished opinion in this case. The circuit court relied upon correct and broadly accepted legal standards under both the Telecommunications Act and the TIA. Its unpublished decision breaks no new ground and conflicts with no other circuits. Insofar as TWT's real complaint appears to be with the district court's determination of undisputed facts, TWT has never directly sought review of those determinations nor has it demanded a trial on the merits. In any case, this Court should not spend its time reviewing disputes over the details of a large factual record.

II. RESPONDENT'S COUNTERSTATEMENT OF THE CASE

A. City Of Portland Right-of-Way Management

The City of Portland owns a vast network of public rights-of-way dedicated primarily to transportation. Contrary to petitioner's claims, the City has assessed the value and cost of maintaining the streets. The streets' value was most recently estimated as $9.7 billion. SER 141. Annual City costs just for its transportation department, franchise management, traffic management, water lines, and storm sewer improvements were over $280 million in 2005-2006. SER 331-330.

The City regularly makes its streets available for private uses like gas lines and electric and telephone wires, typically through long-term contracts called franchises. *Northwest Natural Gas Co. v. City of Portland*, 300 Or. 291, 308 (1985). In return, those using the streets for private gain pay the City "franchise fees" and are subject to certain other conditions. Contrary to petitioner's claim, franchises are enforceable only as contracts. Franchise violations are not enforced by any additional civil or criminal penalties.[4]

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[4] Under the City Code, only those ordinances that are codified are subject to enforcement by fine or imprisonment. Portland City Code 1.10.140. Franchises are not part of the City's codified laws.

Also contrary to TWT's assertions, the City's franchise fees do not vary widely from one company to another. Rather, the City has long used two basic fee structures depending on the type of street use a franchise applicant requests. Entities seeking ubiquitous access to any and all City streets typically pay a 5% gross revenues fee. This includes the gas company, electric utilities, cable systems, and several telecommunications providers, including TWT. SER 074-076. Applicants seeking to use only a limited length of street pay a per-foot charge, currently approximately $3.00 per foot. SER 059. Some pipeline firms and eleven telecommunications providers, including QCC, have such "point-to-point" franchises. All franchises are at www.portlandonline.com/index.cfm?c=33150. In those rare instances when a firm occupies the streets without a franchise, it is charged a "privilege tax" similar to the revenue-based franchise fee. Portland City Code 7.12.070.

Qwest Corporation (Qwest), the "incumbent" telephone company, does not have a long-term franchise. Instead, it operates under a temporary revocable permit, the provisions of which it unsuccessfully challenged in *Qwest Corp. v. City of Portland*, 2006 WL 2679543 (D. Or. Sept. 15, 2006), *appeal voluntarily dismissed*, 9th Circuit No. 06-36022. The permit term is one year and must be regularly renewed. Qwest pays a privilege tax of 7% of gross revenues earned from local exchange service (local telephone), a tax rate established by Oregon state law. Or. Revised Statute §221.515 (2009); Portland City Code 7.12.070.

The legislature intended this tax to generate roughly the same revenue as a 5% tax on all Qwest revenue. *Electric Lightwave,* 452 F. Supp. 2d at 1056, *supra*. The fee was upheld in *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1245 (9th Cir. 2004), *cert. denied*, 544 U.S. 1049 (2005).

Thus, all utilities, not just telecommunications firms, pay fees to use City streets. The fees are roughly equivalent, depending upon the use rights obtained. Although they are not identical, the district court found that the various fees achieve "rough parity" among the firms, taking into account their different circumstances. Petitioner's Appendix 34a (district court adopts "extensive analysis" from *Electric Lightwave*, 452 F. Supp. 2d at 1068-75).[5]

Additionally, Portland utility franchises have for decades commonly required limited in-kind compensation. When a utility digs a street trench for its own purposes, it may be asked to lay conduit or wire for City use. Companies only provide conduit along routes they are otherwise building for their own purposes. TWT Franchise §9; 2ADD00031. The more

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[5] TWT presented some evidence, based on a very limited sample of revenue estimates, that were TWT charged Qwest's permit rate, or Qwest charged TWT's franchise fee rate, the resulting absolute dollar payments by the firms would differ from those paid currently. *See* Petition at 7. TWT presented no evidence, however, that the differing fees had any material economic effect on TWT's operations, and certainly no effect constituting an "actual or effective prohibition."

right-of-way a company uses, the more in-kind duct it will typically provide. The City uses the in-kind contributions for several purposes, including carrying traffic control cables and communications fibers. SER 019-022, 059-060, 082-084. City in-kind requirements parallel compensation arrangements in many other public and private rights-of-way agreements. SER 158-184, 221, 277-305. The City has never requested and TWT has never provided in-kind conduit. Petitioner's Appendix 9a.

With the exception of the TWT in-kind obligation, the district court found that the City's franchise fee system represented "fair and reasonable compensation" for right-of-way use. Petitioner's Appendix 34a-35a.[6]

B. IRNE

IRNE, the "Integrated Regional Network," is the City's own communications system, established primarily to provide City agencies with telephone and data services. IRNE is not separate from the City. Petitioner's Appendix 8a. To create IRNE, the City invested $11 million in new facilities, contracted to share fiber-optic cable with other governments, and

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[6] An expert economist testified that the City's franchise fees, including in-kind contributions, are "fair and reasonable [compensation] . . . reflect[ing] the relevant market value of the [right-of-way]." SER 187. QCC's expert opined that municipal rights-of-way should be treated as an economic "free good," for which no compensation need be paid.

pulled City cable through some conduits previously provided as franchise in-kind compensation. *Id.*

The City also uses IRNE to sell data transmission services to several other government and law enforcement agencies. Petitioner's Appendix 10a. Annual revenues from the sister governments are about $83,000. *Id.*

Although it is part of the City, IRNE operates in City streets under a franchise and pays a 5% franchise fee on the $83,000 it derives from non-City entities. *Id.* Contrary to Qwest's assertions, IRNE's in-kind obligations are more rigorous than private franchisees. Any City agency may use all IRNE's "surplus conduits or ducts" and all IRNE's "lit optical fiber network." IRNE Franchise §9; 3ADD0054.

While about 11% of IRNE's system length utilizes in-kind conduit provided by telecommunications franchisees, none of that conduit was provided by TWT or any other party to this litigation. Petitioner's Appendix 9a. Contrary to TWT assertions, the record showed that the in-kind conduit did not significantly reduce IRNE's costs or prices. The district court found the value of the in-kind conduit is "only . . . a small fraction of the City's total investments in IRNE," Respondent's Appendix 4a, and that in-kind

contributions did not provide the explanation for IRNE's "low" prices. *Id.*[7]

C. INET

The INET (the Institutional Network) is not part of IRNE and not part of the City. All INET facilities, including the wires in City streets, are owned by Comcast Corporation as part of its cable system. Under the Cable Communications Act, 47 U.S.C. §§531, 544, localities may require cable operators to build institutional networks with capacity dedicated for educational and government use. Comcast's $6 million INET connects over 240 public facilities and serves over 20 public agencies. SER 337-338.

Under a Portland-Comcast contract, City staff who operate IRNE also manage Comcast's INET customer relations. INET users pay about $1 million per year for services. The City receives $650,000 for management activities and $400,000 goes to Comcast for providing transmission. Petitioner's Appendix 11a-12a.

The INET uses no IRNE facilities and vice versa. Nor does the INET use any in-kind facilities. *Id.* The INET is interconnected with IRNE, so INET users can also use IRNE to reach other networks. SER 432.

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[7] As an economic expert testified: "The in-kind payments . . . amount to a miniscule proportion of the total value of IRNE and confer no measurable competitive advantage to the City." SER 208.

For example, Portland schools are all connected by the INET, and IRNE connects school headquarters to a TWT Internet hotel. The result: each individual school has a fast Internet connection, SER 086, 249, and TWT has an Internet customer.

TWT makes much of the fact that the City does not charge itself franchise fees for money it earns helping Comcast run the INET. That is irrelevant for purposes of §253, which addresses regulation of telecommunications providers, not cable companies. TWT never tells the Court that INET is part of a cable system in City rights-of-way that is owned by Comcast, not the City, and that it uses no in-kind duct. Nor does TWT mention that cable institutional networks, to provide low or no-cost capacity to local governments, are specifically authorized by federal law. And finally, even if the INET was owned by the City, not by Comcast, TWT presents no legal or philosophical support for the notion that the City, which owns the rights-of-way, should in any case have to pay itself to use its rights-of-way, anymore than TWT pays itself to use its property. *Cf. Puget Sound Power v. City of Seattle, Wash.*, 291 U.S. 619, 624-25 (1934) (municipal utility need not charge itself same fees and taxes assessed against private enterprises).

D. Portland's Open Telecommunications Market

There are 21 telecommunications providers operating in the City under franchise or permit. Petitioner's Appendix 12a. Portland has never denied a telecommunications franchise application, and no applicant has ever declined to pursue a franchise because of any proposed franchise condition. *Id.* at 13a. The City has more telecommunications competitors than any other part of Oregon. SER 072-074. Expert Alan Pearce concluded: "[c]ompetitive entry has been enabled by the city's pro-competitive policies. . . . Portland has fully lived up to the goals and spirit of the Telecommunications Act of 1996." SER 221, 235.

The plaintiffs below, including TWT, all operate successfully in Portland's market. TWT came to Portland in 2002, and by 2005, Portland was one of TWT's top ten markets nationwide, SER 024-025, 052-056, and its revenues had doubled. Petitioner's Appendix 13a. Like all telecommunications providers in the City, TWT pays a franchise fee or privilege tax, which it merely passes on to its customers. TWT has never provided in-kind duct to the City. The district court could find no basis in the record to conclude that City regulatory actions even "may prohibit" the provision of telecommunications by TWT.

E. The Company's "Loss Of Business"

Since TWT can show no adverse impact on its operations from the City's regulatory actions, it focuses instead on the City's non-regulatory participation in the market place – its operation of IRNE and its arrangements with Comcast to provide INET services to governments and schools. TWT declares that it has lost customers to IRNE and the INET because those networks charge lower prices for data transmission than TWT charges.

The district court simply discerned no facts to support TWT's claim that the City's operation of IRNE (using in-kind conduit) had excluded TWT from any significant telecommunications market.[8] To the contrary, the trial court found that the use of in-kind conduit did not significantly lower IRNE prices, Respondent's Appendix 4a, and that IRNE's operation had no significant effect on the local telecommunications market. Petitioner's Appendix 23a.[9]

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[8] The district court noted that the plaintiffs never submitted evidence about relevant "markets," Petitioner's Appendix 23a, and co-plaintiff Qwest went so far as to warn the court away from an analysis of "relevant market impact." Respondent's Appendix 6a-7a.

[9] TWT officials cited one customer it "lost" to IRNE and opined that "given the lower [IRNE] prices . . . , TWT *may* be effectively prohibited from providing these services." *See* QER 00103. But in another case, TWT actually gained a new client when IRNE connected Portland schools to TWT's "internet hotel." SER 250. Amicus Qwest asserts that it has lost numerous customers because of IRNE's lower costs. The district court

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As a matter of law, in any case, the district court properly found that charging low prices for telecommunications services (as the City is alleged to do) is not a "legal requirement" prohibiting provision of service, subject to preemption under §253. Providing customers high quality, low cost service is nothing more than old-fashioned competition, which the 1996 Act explicitly intended to foster. Petitioner's Appendix 23a. Further, of course, Comcast's provision of low cost INET service in cooperation with the City was specifically sanctioned by Congress in the Cable Communications Act of 1984.

III. REASONS FOR DENYING THE WRIT

A. There Is No Need To Review The Ninth Circuit's Memorandum Opinion Regarding The Preemptive Scope Of Section 253

1. TWT Raises No Issues Beyond Those Already Considered And Rejected When The Court Denied Certiorari In *Sprint Telephony*

During the Court's last Term, telecommunications providers sought review of an en banc Ninth

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found no support for that claim. Respondents' Appendix 4a. The record showed that Qwest's "lost customers" now use Comcast INET circuits, not IRNE connections, and that INET services actually cost *more* than the previous low-quality Qwest services. SER 248-251, 260-268, 374-375.

Circuit opinion, *Sprint Telephony v. San Diego County, supra*, and an Eighth Circuit opinion, *Level 3 Commc'ns, L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528 (8th Cir. 2007), *cert. denied*, 129 S.Ct. 2859 (2009), on essentially the same grounds as TWT seeks certiorari here. There is no reason for the Court to review TWT's case after refusing to hear those other actions.

In *Sprint*, the Ninth Circuit overruled its own decision in *Auburn v. Qwest,* which had created an unmanageable preemption standard, the "may prohibit" test. In overruling *Auburn*, the Ninth Circuit held that "a plaintiff suing . . . under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition." *Sprint Telephony,* 543 F.3d at 577.

Sprint sought review from this Court, not to defend the flawed *Auburn* test, but because, Sprint said, the Ninth Circuit's revised rule would require preemption of a local regulation "only if [the regulation] . . . effects a complete ban on the provision of [telecommunications] service." As the Solicitor General noted in urging rejection of the Sprint petition, that is simply not what the Ninth Circuit has said. Instead, the Ninth Circuit has essentially endorsed the FCC's own interpretation of §253 announced by the FCC in *In re Cal. Payphone, supra*. Under both the FCC and Ninth Circuit precedent, "Section 253 can preempt legal requirements that fall short of a complete ban on service," Brief of United States in Case Nos. 08-626 and 08-759 at 14, if they "materially

inhibit[ ] or limit[ ] the ability of any competitor . . . to compete in a fair and balanced legal and regulatory environment." *In re Cal. Payphone, supra*, 12 F.C.C.R. at 14,206.

In this case, TWT attacks the same "straw man," as did Sprint. TWT claims that the circuit court's opinion in this case announces a rule under which a local regulation is preempted "only if it entirely prevents the carrier from operating in the local market." Petition at i. But nothing in the Ninth Circuit's unpublished memorandum says that and nothing indicates an intention to depart from the circuit court's own *Sprint* test and the FCC's *In re Cal. Payphone* test. When it is not tendentiously seeking to pour dangerous implications into the Ninth Circuit memorandum, TWT itself admits that the three-page opinion in this case contains "[no] analysis or explanation," merely "citing the recent *Sprint Telephony* decision," and fails to "state a test for what constitutes an effective prohibition." Petition at 13-14. At most what TWT can say is that despite this analytical silence, the Ninth Circuit "*suggest[ed]* that a local action must completely prevent a carrier from operating before it runs afoul of Section 253(a)." Petition at 14 (emphasis added).[10]

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[10] The one sentence in the Ninth Circuit opinion that concerns TWT reads as follows:

> The in-kind requirements that Qwest challenges, which were provided to the City twelve years ago, do not vest the City with broad discretion, and they do

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TWT's admission that the Ninth Circuit's unpublished opinion contains no substantive analysis is fatal to its petition. In effect, TWT asks that its petition be granted based on nothing more than concerns about ambiguous suggestions in an unpublished opinion relying upon a previous case that correctly stated the law. This Court should not grant certiorari on such flimsy grounds. TWT simply reads non-existent implications into the Ninth Circuit's exceedingly brief opinion.

The sentence in the Court of Appeals' memorandum opinion that most concerns TWT relates not to TWT's own case, but to the in-kind obligations of its co-plaintiff QCC. QCC has not sought certiorari. Further, on the record QCC made, the district court could find no basis for preemption even under the lenient *Auburn* test. QCC contributed in-kind duct nearly ten years before it filed suit. The duct was used by Portland for traffic signal cable. QCC had no obligation to provide more in-kind duct ever again. Petitioner's Appendix 13a-14a, 31a. The payment of in-kind compensation in 1997 had no effect whatsoever on QCC's current or future ability to offer telecommunications.

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not have the effect of prohibiting the provision of telecommunications services, as demonstrated by Qwest's continued operation. *See Sprint Telephone PCS, LP v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (en banc) (setting the standard for whether a requirement violates the Telecommunications Act).

Since QCC could not prevail under the lenient *Auburn* standards, *a fortiori*, it could not obtain a reversal when the standards for preemption, revised under the *Sprint* case, had grown more demanding. The Ninth Circuit's one sentence affirming summary judgment against QCC and summarizing the district court record does not create a new "post-*Sprint*" test that requires further review by this Court.

TWT's case against its own in-kind franchise compensation was, if anything, even weaker than QCC's. Its franchise allows the City to request in-kind duct, but the City has *never done so*. The district court, applying *Auburn*, preempted the unimplemented in-kind compensation provision, not because TWT showed the provision affected its ability to provide services, but solely because the franchise granted the City too much "discretion" to request duct in the future.[11]

Given the record and the elimination of the *Auburn* "may prohibit" test, the panel properly reversed the district court and upheld the in-kind provision in TWT's franchise.[12] The unexercised

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[11] The district judge also concluded that the TWT duct requirement was not "limited." That was simply an error in reading the contract. The City may demand in-kind duct – but it may only ask for one or two pipes and only when and where TWT is building an extension to its own underground system in City streets. 2ADD0031.

[12] TWT argues that it is harmed by the City's use of in-kind duct obtained through its contracts with other franchisees. Even if that were true (and the district court found no such harm),

(Continued on following page)

"discretion" Portland retained under the franchise has not prohibited or effectively prohibited TWT from providing any telecommunications services. In this regard, TWT is situated exactly as was Sprint in *Sprint v. San Diego, supra*.

Finally, with respect to TWT's franchise fee of 5% of gross revenues, the district court concluded that, given the undisputed facts, TWT simply "failed to show that the 5% fee may have the effect of prohibiting the provision of telecommunications service." Petitioner's Appendix 33a. TWT carries on at some length about the difference in the method used to calculate its franchise fee and the method established by Oregon law to calculate the privilege tax charged to the incumbent (and amicus) Qwest Corporation. TWT seems to argue that the difference itself amounts to a prohibition under §253.

To the contrary: Absent a showing that TWT's fees materially affect the "economic viability" of its Portland operations, *In re Cal. Payphone, supra,* differences in TWT's fees and those paid by Qwest are simply immaterial. Under the FCC and virtually unanimous judicial interpretation of §253, any differences in fees charged to different providers are not relevant to the inquiry until a plaintiff has first

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TWT cannot ask a court to preempt the City's *use* of its property (duct work); such use is not a "legal requirement" subject to §253. Further, TWT cannot seek to preempt the contracts of companies – indispensable parties – who are not in the case.

shown an effective prohibition under §253(a). Where a preliminary showing of prohibition is made, then the defending local government can defend even prohibitory requirements as long as they are "fair and reasonable" and "nondiscriminatory" compensation for right-of-way use. 47 U.S.C. §253(c). "Section 253(c) 'derives meaning only through its relationship to Section 253(a)' and 'standing alone cannot form the basis of a cause of action against a state or local government.'" Brief of United States, Nos. 08-626 and 08-759 at 19, quoting *Level 3 Commc'ns L.L.C. v. St. Louis*, *supra,* and *Bell South Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1187, 1189 (11th Cir. 2001).

In this case, the district court reviewed the facts and could find no §253(a) effective prohibition, not even circumstances that "may prohibit" services. Thus, the second analytical step under §253(c) was unnecessary. In an abundance of caution, however, the district court nonetheless reached the secondary issues under §253(c) and concluded that the City's franchise fees were fair, reasonable, and nondiscriminatory. TWT's fees are not identical to Qwest's, but they achieve "rough parity," which is all the law requires. Petitioner's Appendix 34a, adopting reasoning of *City of Portland v. Electric Lightwave, Inc., supra*; *TCG New York, Inc. v. City of White Plains, N.Y.*, 305 F.3d 67 (2nd Cir. 2002).

In the end, TWT's real complaint appears to be not with the Ninth Circuit's decision but with the district court's analysis of the undisputed facts and

its application of the lenient "may prohibit" preemption test that TWT itself has long espoused. Thus, contrary to TWT's suggestion, the extensive record in this case actually makes it a strikingly bad vehicle to review the proper standards of preemption under §253. This case would have to be decided in the City's favor no matter what §253 standard applied.

The district court simply rejected the evidentiary basis for TWT's repeated claim that it was even partly excluded from the market, harmed economically by the City's actions, or "may be prohibited" from providing service sometime in the future. Now, evidently, TWT expects this Court to plow through the massive record made below and second-guess the lower court's assessment of the facts. For only by rejecting the factual underpinnings of the lower courts' decisions could this Court reach and address TWT's suggested legal "questions presented." This Court should decline TWT's invitation to engage in such post hoc factual analysis.

2. The Ninth Circuit Opinion Creates No Split In The Circuits' Interpretations Of Section 253 And Is Consistent With FCC Precedent

TWT mischaracterizes the Ninth Circuit opinion in this case. By doing so, it can argue that the Ninth Circuit is out of step with the FCC and other circuits.

But the circuit court's decision is nothing more than an application of, not a radical departure from,

the holding in *Sprint Telephony*. The Court has already heard and rejected arguments that *Sprint* creates a split in the circuits and contradicts FCC precedent. The FCC does not perceive that split, and the arguments made by the United States as amicus to this Court in *Sprint* are fully applicable in this case and need not be repeated at length. *See* Brief for United States, Nos. 08-626 and 08-759. The memorandum opinion in TWT's Ninth Circuit appeal does nothing to alter the existing administrative and judicial consensus on how to apply §253, a consensus the FCC has already identified for the Court. The Court need not review the Ninth Circuit's ruling in this case in order to resolve a split among the circuit courts.

3. The Court Need Not Interject Itself Into The Process Of Defining When A Regulation Has The "Effect Of Prohibiting" The Provision Of Service

TWT suggests that the Court should intervene now to "clarify . . . the standard for establishing that a local requirement has the 'effect of prohibiting' telecommunications service." Petition at 18. To the contrary, this Court's involvement in that question is both premature and unnecessary.

The FCC has already explained in its amicus brief in the *Sprint* and *Level 3* cases that the federal courts have already reached a general consensus on

how to interpret and apply §253. There is no conflict among the circuits – except for the imaginary conflict that TWT would create by reading "suggestions" into the unpublished opinion in this case.

Putting aside TWT's overheated rhetoric about what the Ninth Circuit did here, there is no indication that the federal courts are at sea or require early instruction from this Court on how to apply §253. The circuits have coalesced around an interpretation of §253 based on the statute's plain language and the decisions from the FCC, an interpretation which counsels preemption of local requirements when they actually prohibit or "effectively prohibit" the provision of telecommunications. There are numerous cases in which courts have preempted local requirements that were not, on their face, prohibitory, but nonetheless had indirect or "effective" prohibitory consequences.

In addition, the FCC enjoys express authority to preempt state and local requirements that violate §253(a). 47 U.S.C. §253(d). The FCC has already advised the Court that it will act to insure uniformity if there develops "significant divergence in outcomes among the circuits [regarding §253]." Brief of the United States, Nos. 08-626 and 08-759 at 18. That makes even less necessary any Supreme Court review of the unpublished opinion in this case.

B. The Court Need Not Review The Ninth Circuit Application Of The Tax Injunction Act

TWT challenged its City of Portland 5% franchise fee. The fee is set by Portland's City Council, it applies to TWT and any other enterprise with a similar franchise, and the proceeds flow into the City's general fund.

The Ninth Circuit refused to hear TWT's challenge to the franchise fee, holding that such a challenge was foreclosed in federal court by the Tax Injunction Act (TIA). 28 U.S.C. §1341. In doing so, the Ninth Circuit followed its own TIA precedents which, in turn, are consistent with those of circuits all across the country.

1. There Is No Conflict Among The Circuits' Interpretations Of The TIA

TWT can point to no circuit court that has interpreted the TIA in a manner contrary to the Ninth Circuit's. The Ninth Circuit is the first and only circuit to consider the specific question of whether the TIA forecloses federal court jurisdiction over §253 preemption challenges to local gross revenue franchise fees. On the other hand, in a significant judicial development ignored by TWT, other circuits, outside the context of the Telecommunications Act, have held that gross revenue franchise fees *are* taxes for purposes of the TIA. *See* discussion, *infra*.

Finding no express conflict among the circuits, TWT instead argues that there is an "implicit" conflict among the circuits because other circuit courts have considered and preempted various local "right-of-way fees" on telecommunications providers without ever mentioning the TIA. Having substantively judged preemption claims against right-of-way fees, TWT says, those circuits must have silently considered the TIA jurisdictional question and decided it in conflict with the Ninth Circuit ruling.[13]

Circuit court silence is no basis upon which to grant certiorari. Unless other circuit courts have had a chance openly to consider and decide a question of law, it is presumptuous to assume that silence represents a considered holding on an issue of law never presented to those circuit courts.

TWT's argument also ignores the nuances of the many §253 cases and ignores the care with which courts assess the details of a TIA defense. According to TWT, other courts have reviewed "right-of-way fees" under §253 without pausing to consider the applicability of the TIA. But there are numerous kinds of rights-of-way fees, many of which differ significantly from the City's franchise fee.

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[13] Amicus Qwest cites the case of *Dallas v. FCC*, 118 F.3d 393 (5th Cir. 1997). That case also did not interpret the TIA and did not determine if franchise fees should be labeled taxes for purposes of the TIA.

The Ninth Circuit did not hold, and has never held, that all local fees imposed on telecommunications providers are "taxes" under the TIA and thus exempt from federal court review. Indeed, in other cases, it has used §253 to preempt other kinds of local telecommunications "fees." *City of Auburn v. Qwest, supra; Qwest Commc'ns Corp. v. City of Berkeley*, 433 F.3d 1253 (9th Cir. 2006). In this case, the Ninth Circuit said only that the City of Portland's 5% contractual franchise fee should be classified as a tax for purposes of application of the TIA. The decision does not conflict with any decision of any other circuit court.

Indeed and to the contrary, when other courts have specifically addressed the issue presented in this case, they have agreed with the Ninth Circuit: street use franchise fees are taxes for purposes of the TIA. No circuit court has ever held to the contrary. *Robinson Protective Alarm Co. v. City of Philadelphia*, 581 F.2d 371, 376 (3d Cir. 1978); *Keleher v. New England Tel. & Tel. Co.*, 947 F.2d 547, 549 (2nd Cir. 1991), *abrogated on other grounds by Jefferson County v. Acker*, 527 U.S. 423, 434 (1999); *see also, City of Chattanooga, Tenn. v. Bellsouth Telecomms., Inc.*, 1 F. Supp. 2d 809 (E.D. Tenn. 1998); *Diginet, Inc. v. Western Union ATS, Inc.*, 845 F. Supp. 1237 (N.D. Ill. 1994); *Independent Coin Payphone Ass'n, Inc. v. City of Chicago*, 863 F. Supp. 744 (N.D. Ill. 1994); *cf. Yakima Valley Cablevision, Inc. v. F.C.C.*, 794 F.2d 737, 740-41, 744, n. 24 (D.C. Cir. 1986) (cable

franchise fees of 3-5% of gross revenues probably constitutes a tax).[14]

There is no split in the circuit courts on this issue. There are three circuits that have explicitly considered whether street use franchise fees are "taxes" for purposes of the TIA. All those circuits, the First, Third, and Ninth, agree that franchise fees should be treated as taxes for purposes of the TIA.

2. The Ninth Circuit Decision Applied The Tax Injunction Act Test Uniformly Used By The Circuit Courts

In this case, the Ninth Circuit decided the City's franchise fee was a "tax" for purposes of the TIA by applying the test enunciated in *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 931 (9th Cir. 1996) and *Qwest v. City of Surprise*, 434 F.3d 1176, 1183 (9th Cir. 2006). *Bidart* adopted a three-prong test for identifying a tax under the TIA: (1) who adopted the fee (if a legislative body, it is more probably a tax);

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[14] One district court held that a particular cable television franchise fee was not a "tax" for purposes of the TIA. *Time Warner Entm't v. City of Lincoln, Nebraska*, 360 F. Supp. 2d 1012, 1017 (D. Neb. 2005). The court decided the fee was not a tax because it assessed fees on Time Warner revenues that had nothing to do with provision of cable service in Lincoln. The court declared, however, that if, as in this case, "the franchise fees were assessed in the amount of five percent of Time Warner's gross receipts from cable subscribers within the City's jurisdiction, then the Court would agree . . . that the franchise fees are a 'tax.'" *Id.*

(2) to whom it applies (if it has broad reach, it is more probably a tax); and (3) how funds are used (if funds are placed in the general fund, it is more probably a tax). If the first two factors are not dispositive, the last test is the most important because the primary purpose of the TIA is to prevent federal courts from interfering with "the flow of central revenues" to state and local governments. *Bidart*, 73 F.3d at 932; *see also Rosewell v. LaSalle Nat'l Bk.*, 450 U.S. 503, 527 (1981).

The Ninth Circuit *Bidart* test conforms to the "tax" test under the TIA of the six other circuits that have spoken on the subject. *San Juan Cellular Tel. Co. v. Public Service Comm'n of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992); *Keleher*, 947 F.2d at 549; *Robinson Protective Alarm Co.*, 581 F.2d at 376; *Wright v. McClain*, 835 F.2d 143, 144-45 (6th Cir. 1987); *Neinast v. Texas*, 217 F.3d 275, 278 (5th Cir. 2000); *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000).[15]

There is no split in the circuits on how to interpret the TIA. The Ninth Circuit applied the test uniformly used by all the circuits and decided the City's franchise fee was a "tax" under the TIA.

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[15] In *San Juan Cellular*, 967 F.2d at 685, an *administrative agency* imposed a 3% gross proceeds fee on cellular providers and deposited the fee into a *special fund* used only to finance agency activities. Then-Chief Judge Breyer held that under those circumstances the fee was not a "tax" for purposes of the TIA.

3. The Ninth Circuit Ruling Does Not "Eviscerate" Section 253(a)

TWT claims that the Ninth Circuit determination that Portland's franchise fee is a "tax" for purposes of the TIA "eviscerates" §253 and allows municipalities to "impose financial burdens in the guise of a tax." TWT's concern is misplaced and vastly overstated.

By ruling that the City's franchise fee is a "tax" under the TIA, the circuit court did no more than decide where a §253 challenge to franchise fees is to be heard. The TIA simply directs federal courts to decline jurisdiction over a case that would rule on the legality of a state or local tax. But TWT or others can still seek review in state court.

Moreover, as the case law demonstrates, telecommunications firms have used §253 to seek preemption of a wide variety of local regulations, not just those related to fees and taxes. If the TIA closes federal courts to plaintiffs challenging state and local taxes, federal courts remain open to challenges to all the other local or state regulations and fees that the companies find "prohibitory."

The legal issue that appears most to concern TWT, in fact, simply was never before the Ninth Circuit and cannot therefore be reviewed by this Court. TWT notes that the Telecommunications Act itself contains a clause directing that the law "not be construed to modify, impair, or supersede . . . any State or local law pertaining to taxation." Telecommunications Act of 1996, §601, 110 Stat. 143, 47 U.S.C.

§152 note. TWT warns that if the word "tax" for purposes of §601 (which protects taxes as a substantive matter) is interpreted to mean the same thing as the word "tax" for purposes of the TIA (which protects taxes on a jurisdictional basis), then §601 may be interpreted substantively to foreclose federal jurisdiction of §253 suits seeking to preempt local taxes and franchise fees even in state court.

TWT's concern does not justify review by this Court. The Ninth Circuit did not hold that §601 "taxes" were the same as TIA "taxes." The issue was never presented to it for decision. All the Ninth Circuit did in this case was to send TWT and similar plaintiffs to state court to challenge taxes as that term is broadly interpreted in the TIA. Oregon state courts provide an alternative "plain, speedy, and efficient" avenue to review local taxes under §253. *AT&T v. City of Eugene,* 177 Or.App. 379 (2001).

If TWT's real question is how courts should interpret §601 of the Telecommunications Act, it simply cannot be answered in this case. Granting this petition for certiorari will not provide a vehicle to address the issue.

4. The 1996 Telecommunications Act Did Not Repeal Or Replace The TIA

.e Court has described the TIA "as a . . . 'broad juris.ictional barrier.'" *Arkansas v. Farm Credit Services of Cent. Arkansas*, 520 U.S. 821, 827-28 (1997). It has warned that:

> Given the systemic importance of the federal balance, and given the basic principle that statutory language is to be enforced according to its terms, federal courts must guard against interpretations of the Tax Injunction Act which might defeat its purpose and text.

Fundamental to any statutory interpretation, of course, is the principle that "repeals by implication are not favored" and will not be presumed unless the "intention of the legislature to repeal [is] clear and manifest." *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (internal quotation marks omitted).

> We will not infer a statutory repeal "unless the later statute 'expressly contradict[s] the original act'" or unless such a construction "is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all."

Traynor v. Turnage, 485 U.S. 535, 548 (1988) (citations omitted).

These principles have been applied by the circuit courts in rejecting assertions that later congressional acts have impliedly repealed the jurisdictional protections of the TIA. Instead, courts refuse to "carve out exceptions to the Tax Injunction Act unless Congress clearly expresses an intent to create an exception." *Blangeres v. Burlington Northern, Inc.*, 872 F.2d 327, 328 (9th Cir. 1989), citing *Ashton v. Cory*, 780 F.2d 816, 822 (9th Cir. 1982); *see also Bank of New*

England Old Colony v. Clark, 986 F.2d 600, 602-03 (1st Cir. 1993).[16]

TWT asks this Court to conclude that in passing the Telecommunications Act Congress intended to repeal the TIA with respect to state or local taxes related to telecommunications. There is simply no basis to find that Congress "clearly and manifestly intended" that result.

1. In §601 of the 1996 Act, Congress explicitly protected state and local taxes from preemption under the Act. Given this congressional concern to protect the substance of state and local taxes, the Act surely cannot be read silently to repeal long-standing jurisdictional protections for state and local taxes. This is true irrespective of whether the definition of "tax" is identical between the TIA and the Telecommunications Act.

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[16] TWT relies on *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 472-473 (1976), to suggest that the normal rules against "implied repeals" do not apply to the TIA, arguing that an "unequivocal statement" of intent to repeal or supersede the TIA is not required. This is a serious misreading of *Moe*, which protected the rights of an Indian Tribe to bring suit in its own name to protest improper application of state tax laws where its trustee – the United States government – could bring the suit but had failed to do so. The case is best understood, as Justice Kennedy has explained, as permitting a federal challenge to a state tax by a Tribe "*only* because a second federal statute [28 U.S.C. §1362] granted *sweeping* federal-court jurisdiction where an Indian tribe was a party." *Arkansas*, 520 U.S. at 828 (emphasis added).

2. The Telecommunications Act contains no provisions establishing explicit federal judicial jurisdiction over §253 preemption claims. Courts have heard the claims, instead, under general federal question or diversity jurisdiction.

3. Section 253 itself evinces no explicit intent to preempt local taxes or fees. It seeks, in general, to preempt "state or local statute[s], . . . regulations, or . . . legal requirement[s]." Section 601 then makes clear that §253 preemption cannot be used against taxes.

4. There is no mention of the Tax Injunction Act anywhere in the lengthy legislative history of the Telecommunications Act.

5. In the legislative history cited by TWT, Senator Boxer announced that she preferred, in general, that local federal courts, not the FCC, hear §253 preemption claims. Her purpose was to protect local governments from the obligation to defend themselves in the distant federal administrative venue. 141 Cong. Rec. S 8171 (daily ed. June 12, 1995). One searches in vain, however, for any statement by Senator Boxer or any other member of Congress even intimating that, while protecting localities from distant administrative hearings, at the same time they intended to repeal the TIA's long-standing jurisdictional limits

> on federal court interference in local revenue raising activities. To find intent to repeal the TIA in this Congressional silence would breach every rule of statutory interpretation announced by this Court.

IV. CONCLUSION

The Court should deny TWT's petition for certiorari. The unpublished opinion of the Ninth Circuit raises no legal issues requiring this Court's review.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

TIME WARNER TELECOM OF OREGON, LLC, and QWEST COMMUNICATIONS CORP., Plaintiffs, v. THE CITY OF PORTLAND, Defendant.	CV 04-1393-PA **OPINION** (Filed May 10, 2006)
QWEST CORP., Plaintiff, v. THE CITY OF PORTLAND, Defendant.	CV 05-1386-PA **CONSOLIDATED CASES**

PANNER, J.

Plaintiff Qwest Corp. (Qwest) sells telecommunications services in Oregon. Qwest has a temporary revocable permit with the City of Portland (the City) that allows Qwest to install and operate telecommunications systems in City streets.

In this action against the City, Qwest claims that the City's operation of a fiber optic network, the Integrated Regional Network Enterprise (IRNE), violates federal law, and that the City illegally provides telecommunications services outside the City limits.

The parties move for summary judgment. I grant the City's motion and deny Qwest's motion.

DISCUSSION

In the companion case, *Time-Warner v. City of Portland* (*Time-Warner*), this court held that the Telecommunications Act of 1996, 47 U.S.C. § 253, did not preempt IRNE's sales of telecommunications services to other governments and public schools. In the following discussion, I assume familiarity with the *Time-Warner* opinion. Because Qwest's motion for summary judgment was argued after this court issued the *Time-Warner* decision, Qwest's motion has become in effect a motion to reconsider this court's prior rulings on IRNE's validity.

I. In-Kind Contributions

Qwest, like the plaintiffs in *Time-Warner*, attacks the City's use of in-kind contributions from telecommunications franchisees to help create IRNE's fiber optic network. Qwest characterizes in-kind contributions as "extortion," and claims that they give the City an unfair competitive advantage over private telecommunications providers.

A. Issue Preclusion

Qwest argues that Magistrate Judge Ashmanskas's opinion in *City of Portland v. Electric Lightwave, Inc.*, Civ. No. 03-538-AS (D. Or. May 5, 2005) (*ELI*), bars

the City from contending here that in-kind provisions are not preempted. Qwest relies on the doctrine of issue preclusion. To establish that issue preclusion applies, Qwest bears the burden of showing that the issue litigated and decided in *ELI* was identical to the issue litigated here. *See State Farm Fire & Cas. Co. v. Century Home Components,* 275 Or. 97, 104-05, 550 P.2d 1185, 1188-89 (1976).

In *ELI*, Judge Ashmanskas held that § 253 preempted the in-kind provisions of Electric Lightwave's franchise agreement with the City. That ruling was based on an analysis of the specific franchise agreement at issue there. Judge Ashmanskas did not rule that all in-kind provisions are preempted by § 253. Whether § 253 preempts an-kind provision on the precise wording of the particular provision and on the franchise agreement as a whole. Because the issue litigated in *ELI* was not identical to the issue here, the decision in *ELI* has no preclusive effect.

B. The Challenge to In-Kind Provisions Fails

Qwest characterizes in-kind contributions as subsidies. I agree, however, with the City's expert economist, Ed Whitelaw, that the in-kind contributions here are not subsidies. Franchisees provide in-kind contributions to the City in exchange for the valuable right to use the City's streets for telecommunications networks. *See TCG New York, Inc. v. City of White Plains,* 305 F.3d 67, 80 (2d Cir. 2002) (cities "retain

the flexibility to adopt mutually beneficial agreements for in-kind compensation").

Qwest contends that in-kind contributions "have the effect of lowering IRNE's prices on competitive services by 50%." Qwest Supp. Submission 2. However, the record shows that in-kind contributions supply only about 10% of IRNE's fiber, and that the value of the in-kind contributions is a small fraction of the City's total investment in IRNE. The City's use of in-kind contributions does not explain why IRNE is able to charge half of what Qwest charges for comparable services.

Regardless of how much in-kind contributions lower IRNE's prices, Qwest has not shown that IRNE's prices may have the effect of prohibiting the provision of any telecommunications service. *See Qwest Communications Inc. v. City of Berkeley,* 433 F.3d 1253, 1256-57 (9th Cir. 2006) (telecommunications plaintiff must show only that a regulation or legal requirement may prohibit it from providing a telecommunications service). A customer's decision to purchase from IRNE rather than Qwest is not a prohibition or potential prohibition that would fall within the scope of § 253 preemption.

II. Intergovernmental Agreements

Like the plaintiffs in *Time-Warner,* Qwest attacks the City's use of intergovernmental agreements (IGAs) in creating IRNE and in providing telecommunications services to governments and public schools.

Qwest claims it is not challenging the IGAs themselves, but the City's use of assets obtained through IGAs.

To help create IRNE, the City, with the Oregon Department of Transportation and the Tri-Metropolitan Transportation District (Tri-Met), formed the Cooperative Telecommunications Infrastructure Committee (CTIC), through an IGA. CTIC members share fiber, providing 38% of IRNE's network. Qwest contends that the CTIC IGA gives the City an unfair advantage over private telecommunications providers.

Qwest's challenge to IGAs fails for the same reasons that the plaintiffs' challenge failed in *Time-Warner*. Nothing prevents Qwest from entering into similar resource-sharing agreements with other private carriers or with governments. In any event, § 253 does not apply here because the City's use of fiber through the CTIC IGA is not a "regulation" or "legal requirement" imposed on Qwest or any other private carrier.

Nor is the fiber obtained through the CTIC IGA "free" to the City, as Qwest argues. The IGA requires that the parties share their resources, creating a mutually beneficial barter relationship.

Qwest claims that the City improperly circumvents public bidding when the City enters into IGAs with other governments for the sale of IRNE's services. However, the statutes authorizing IGAs specifically exempt IGAs from public bidding requirements. Or. Rev. Stat. § 279A.025(2)(a).

III. The Relevant Market

IRNE sells telecommunications services only to local governments and public schools. The City states that it has no intention of selling IRNE's services to any private businesses or individuals. Under these facts, Qwest can portray IRNE as a viable competitor only by defining the market as narrowly as possible. This is a time-honored tactic used by plaintiffs in antitrust litigation.[1] Here, the tactic is out of place because the concept of a relevant market has no place in determining whether § 253 preemption applies. Regardless of IRNE's market power, a governmental agency's decision to purchase telecommunications services from IRNE is not equivalent to an actual or a potential prohibition of a telecommunications service. (That is assuming that IRNE's conduct in the market could be considered a "regulation" or "legal requirement.")

Qwest refers in its briefs to "the relevant market" and to "the government and education market in Portland." *See* Qwest Opp. to Mot. for Summ. J. 4 ("The relevant market in this case is not the national telecommunications market, or even the Portland

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[1] *See, e.g.*, Robert Pitofsky, *New Definitions of the Relevant Market and the Assault on Antitrust*, 90 Colum. L. Rev. 1805, 1816, (1990) ("There will almost always be classes of customers with strong preferences but to reason from the existence of such classes to a conclusion that each is entitled to a separate narrow market definition grossly overstates the market power of the sellers.").

market. IRNE only operates in the Portland governmental and educational market. . . ."); *id.* at 9 ("The only relevant market is the governmental and educational market in Portland"); Qwest Mem. in Supp. of Summ. J. 18 ("IRNE and [Qwest] compete in the same government and education market." (footnote omitted)); Qwest Reply in Supp. 6 ("IRNE competes in the marketplace for public-sector customers."). Qwest claims IRNE has caused Qwest to lose "11 percent of [its] annual revenue in the government and education market in the Portland area." Qwest Mem. in Supp. 19 (claiming that Qwest loses about $50,000 per month because of competition from IRNE).

Because of these frequent references to the relevant market, at oral argument I asked counsel for Qwest whether any legal authority defined the "relevant market" for the preemption analysis under § 253. Counsel knew of no such authority. In a supplemental brief filed after oral argument, Qwest stated that it was "concerned" that this court "has or will adopt a 'relevant market impact' standard." This court has no such intention.

IV. IRNE's Service to Non-Inhabitants

Qwest contends that because IRNE provides services outside City limits, the City is violating section 10-102 of the City Charter, which allows the City to operate projects like IRNE "for the purpose of serving the City and the people thereof for uses public

and private." Qwest contends that the City is also violating Or. Rev. Stat. § 225.110, which allows cites to operate telephone systems: "When authorized by its charter . . . , a city may purchase, build, own, operate and maintain telephone or telegraph systems within or without its boundaries, for the benefit and use of its inhabitants at cost or for profit."

Neither the City Charter nor any Oregon statute prohibit the City from providing services through IRNE to other government entities outside the City limits. Connections to governments outside City limits benefit the City because the connections are two-way. For example, sharing law enforcement information with the City of Hillsboro benefits both cities. IRNE receives revenue from IRNE's customers, which also benefits the City. Most importantly, neither the statute nor City Charter provision can be read as restrictively as Qwest argues. The State authorizes the City to own property for any "general benefit and use of the people within or without the city." Or. Rev. Stat. § 223.005(2).

CONCLUSION

Qwest's motion for summary judgment (#169) is denied. The City's motion for summary judgment (#162) is granted.

DATED this 10 day of May, 2006.

/s/ Owen M. Panner
OWEN M. PANNER
U.S. DISTRICT COURT JUDGE

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No. 09-309

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

tw telecom of oregon llc,

Petitioner,

v.

City of Portland,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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RULE 29.6 STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I. The Court should review the Ninth Circuit's interpretation of Section 253 of the Telecommunications Act of 1996.

The Telecommunications Act of 1996 provides that no state or local regulation "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" (47 U.S.C. § 253(a)), reserving to the states and local governments the authority "to manage the public rights-of-way [and] to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis" (*id.* § 253(c)).

This case presents a violation of § 253 that is particularly egregious in its scope and consequence. Here, the City of Portland itself has entered the telecommunications business through its own competitive local exchange carrier ("CLEC"), which is named the Integrated Regional Network Enterprise ("IRNE"), and competes directly against private sector carriers. The City is using its municipal powers to favor its own CLEC's services. Thus, this is not simply a case where a municipality is deterring competition in general through excessive right-of-way fees for the benefit of the city treasury. Nor is this simply a case where the municipality has discriminated in its treatment among different private sector providers. Here, the City is acting in violation of § 253 for the benefit of *itself* in its role as a competitor with the private sector.

Specifically, the City has extracted fees and free communications facilities from other local carriers through its franchise ordinances. The City has done so without reference to the statutory requirement that any such consideration be fair and reasonable, and recovered on a competitively neutral and non-discriminatory basis. The City acts as a "resource aggregator" for IRNE, requiring other carriers to provide free conduit. The City then gives that conduit to IRNE so it can lower its costs for building its network, and obtain market share of governmental and educational business at the expense of competing carriers through lower prices. The City has also exempted IRNE from some of the franchise burdens that it imposes on other carriers, thus cementing IRNE's unfair and unlawful advantage.

A. The Ninth Circuit's construction of Section 253(a) creates a conflict among the Circuit Courts and raises significant legal issues

Respondent City of Portland argues that the Ninth Circuit's opinion neither creates a conflict among the circuit courts nor otherwise raises significant legal issues. Respondent's argument rests on a substantial misstatement of the record, of the Ninth Circuit's decision, and of the decisions of other circuits, and is without merit.

1. The Ninth Circuit opinion creates a split among the Circuits and is inconsistent with FCC precedent

The City's argument that the Ninth Circuit's opinion does not create a split among the circuits with regard to § 253 is based on what the City characterizes as an "ambiguous suggestion" in the opinion. City's Brief in Opposition, at 22. While the opinion is brief, there is nothing ambiguous about it. It shows that the court applied a test requiring a carrier to show that it could not operate in order to establish a violation of § 253(a). Petition, Appendix A, p. 3a-5a. There is no other way to read that language, and the City has not offered any alternative meaning that is tied to the language of the opinion and not pure fantasy on the City's part.

As discussed in the Petition, at pages 15-17, the test applied by the panel in this case is in direct conflict with the standard adopted by the First, Second, Eighth, and Tenth Circuits, each of which generally agrees with the FCC's decision in *In re California Payphone Ass'n*, 12 F.C.C.R. 14,191, 14,206, ¶ 31 (1997), that a local law "has the 'effect of prohibiting' the ability of any entity to provide" telecommunications if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.*, *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 15, 18 (1st Cir. 2006), *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67,76 (2d Cir. 2002), *cert. denied*, 538 U.S. 923 (2003), *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271 (10th Cir. 2004), *Level 3 Commc'ns, LLC v. City of St. Louis*, 477 F.3d 528, 533 (8th Cir. 2007), *cert. denied*, 128 S. Ct.

2859 (2009). This standard is different from the absolute exclusion that the Ninth Circuit requires.

The City's argument that the FCC's *In re California Payphone Ass'n* decision requires that the discriminatory fees materially affect the "economic viability" of TWTC's Portland operations[1] misstates the holding in that case. The FCC did not announce a test that says that in order to find that a local legal requirement "has the effect of prohibiting" the ability of any entity to provide any telecommunications service, the provider must show that the requirement materially affects the "economic viability" of its operations in the local jurisdiction. The test is as stated above: whether the requirement materially "inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *In re California Payphone Ass'n, supra*, 12 F.C.C.R. at 14,206, ¶ 31. The Ninth Circuit in this case adopted a test which makes it more difficult to assert a § 253 challenge, and which is out of line with other Circuits and the FCC's own position.

2. Petitioner raises issues beyond those rejected when this Court denied certiorari in *Sprint Telephony*

The City argues that this Court has already heard and rejected arguments that the decision in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir 2008), *cert. denied*, 129 S. Ct. 2860 (2009), creates a split in the circuits and contradicts FCC

[1] City's Brief in Opposition, at 24.

precedent. But TWTC's argument is not that the *Sprint Telephony* decision creates a split among the circuits, but rather that the Ninth Circuit Panel's application of *Sprint Telephony* in this case creates such a split.

The *Sprint Telephony* court did not establish a standard for showing that a local requirement has the "effect of prohibiting" the provision of a telecommunications service. But the Ninth Circuit here did set such a standard, holding that a local action must completely prevent a carrier from operating before it runs afoul of § 253. That conclusion directly conflicts with the standard adopted in other circuits and with the standard announced by the FCC in *In re California Payphone Ass'n.*

B. Factual disputes regarding the impact of Portland's regulatory structure will be resolved by the lower courts after this Court states the proper legal standard

The City argues that this case is a poor vehicle to address the correct interpretation of § 253, on the ground that the City's ordinance had no adverse effect on petitioner. Therefore, respondent asserts, its ordinance would not be preempted under any of the competing interpretations of § 253. Again, the City misstates the record in this case, the legal test that the Ninth Circuit applied, and the legal conclusion that the Ninth Circuit drew from it. The Court of Appeals did not sustain the City's franchise ordinance on the premise that it had no effect on petitioner, but rather because the court avowedly read § 253 to require petitioner to make a very particular showing: TWTC, in

order to have standing, must show it was unable to operate (i.e., provide any services) in Portland as a result of the ordinance.

The City devotes much of its Brief in Opposition to an argument about what the District Court found and the conclusions it drew from the "undisputed evidence." In fact, the District Court's reading of the evidence, the inferences it drew from that evidence, and the construction it gave to § 253, were all riddled with error. But, ultimately, once this Court sets the proper legal standard, the trial court's rulings will be reviewed de novo by the appellate court. *See Universal Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004).

It is what the Court of Appeals did in this case that is the key and the focus of TWTC's petition for writ of certiorari. And the Court of Appeals did not discuss or reach in any meaningful way the factual issues in this case, because it adopted a "bright-line" test that a carrier must be prevented from operating in the area covered by the challenged regulation in order to establish a case under § 253. For purposes of that test, the only relevant fact is that TWTC was not driven out of Portland by the franchise fees and in-kind requirements.

TWTC vigorously disputes the City's portrayal of the record below in many respects, including the following:

1. The City asserts TWTC operates successfully in Portland, which is one of TWTC's top ten

markets.[2] While Portland is in the top ten cities in terms of factors used to measure the performance of city managers, the evidence is that TWTC is not profitable in Portland.

2. The City claims TWTC was not harmed by IRNE's operation because in one case TWTC actually gained a new client when IRNE connected Portland schools to an "internet hotel."[3] The "new client" TWTC gained was a customer for internet access service, which IRNE doesn't provide. TWTC was effectively prohibited from providing the data transmission service from the school's location to the internet hotel, a service that IRNE does provide.

3. The City claims that IRNE's use of in-kind facilities does not harm TWTC because the value of those extracted facilities is only a small fraction of the City's total investments in IRNE, which is $11 million[4]. Comparing the cost of the extracted in-kind facilities to the $11 million the City spent on IRNE is not legitimate, because much of the $11 million relates to IRNE's provision of switched services to City bureaus, not to its provision of data transmission services, and those costs are not included in the costs

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[2] City's Brief in Opposition, at 17.

[3] City's Brief in Opposition, at 18, n.9; the "internet hotel" is a facility at which it is possible to connect with a number of internet service providers.

[4] City's Brief in Opposition, at 13-14.

IRNE considers in setting prices for services to third parties. Also, the City's witnesses admitted that the in-kind provisions allow it to "build IRNE at a fraction of the cost normally associated with such a project."[5]

4. The City argues that TWTC cannot complain about the in-kind contribution requirement in its franchise, because the City hasn't required any in-kind facilities from TWTC.[6] This fact is not significant. The obligation to provide free facilities to a competitor, who will use them to compete at lower prices, is such a deterrent to competition as to constitute an effective prohibition on providing service.

5. The City asserts that franchise fees need not be paid on INET revenues because the INET is part of a cable system and § 253 addresses regulation of telecommunications providers, not cable companies.[7] But the INET is a communications network, not a cable network, and INET services are telecommunications, not cable, services. See definitions of "cable service" (47 U.S.C. § 522(6)) and "telecommunications" (47 U.S.C. § 153(43)). Therefore, the revenue IRNE gets from selling INET services should be included in its calculation of gross revenues.

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[5] 8 QER (Olson Depo. I) at 86:16-22

[6] City's Brief in Opposition, at 23-24.

[7] City's Brief in Opposition, at 16.

6. The City argues TWTC cannot challenge IRNE's *use* of the in-kind facilities, because the City's use of its property is not a "legal requirement" that it imposes on carriers as part of its regulatory scheme and thus is not preempted by § 253(a).[8] The City is wrong. The reason why the City extracts free facilities from carriers — namely, to give IRNE a competitive advantage — is an integral part of the regulatory scheme that is subject to § 253(a).

While the City raises what it suggests are procedural hurdles, there are no impediments to review by this Court. First, neither lower court held that it was necessary to join every other carrier in order for TWTC to argue and prove that the City's overall scheme violated § 253(a). Second, the City questions whether the Ninth Circuit opinion even addressed TWTC's challenge to the in-kind contributions requirement. As noted in TWTC's Petition at p. 14, TWTC, Qwest Corporation, and Qwest Communications Corporation all broadly challenged their own franchises as well as the City's overall regulatory scheme, including the in-kind contribution requirements. In the absence of any other explanation, the Ninth Circuit's opinion can only be read as denying *all* of the § 253(a) challenges on the grounds that none of the carriers could show that it was prevented from operating in the market.

The City's view of the facts, including the extent to which its regulatory structure has impaired TWTC's profitability, and the extent to which the regulations are

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[8] City's Brief in Opposition, at 23-24.

discriminatory, are beyond the reach of TWTC's Petition. The Petition instead addresses the legal standards applied by the Ninth Circuit and the District Court. If the Ninth Circuit and District Court are directed to apply the proper legal standard, then these disputes regarding the contents of the record will be resolved there.

II. The Court should review the Ninth Circuit's determination that the Tax Injunction Act bars jurisdiction

A. The Tax Injunction Act should not be applied to thwart federal telecommunications policy

If, as a result of this case, the Tax Injunction Act (28 U.S.C. § 1341) trumps § 253 of the Telecom Act, then state and local governments will be able to discriminate in favor of preferred telecommunications providers, so long as that discrimination takes the form of a fee for use of rights-of-way rather than some other type of "statute or regulation or other . . . legal requirement." 47 U.S.C. § 253(a). The policy of open competition in telecommunications services will be meaningless if federal courts are stripped of jurisdiction to prevent discriminatory franchise fees.

The Congressional Record supports that the Telecom Act is a "very, very broad prohibition against State and local" regulation of telecommunications companies.[9] To facilitate competition, Congress "has

[9] 141 Cong. Rec. S8212 (daily ed. 6/13/1995) (Comments of Sen. Gorton).

taken the regulation of local telecommunications competition away from the States [and local governments]." *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378, n. 6 (1999).

Congress has thus determined that it is necessary for the federal government to intrude in state regulation of telecommunications providers, including by requiring that "compensation . . . for use of public rights-of-way" be imposed "on a nondiscriminatory basis." 47 U.S.C. § 253(c). To call such compensation a "tax" — which is not subject to review in federal court by virtue of the TIA — is to thwart the intention of Congress in enacting the Telecom Act.

B. If franchise fees are "taxes," Section 601 of the Telecom Act eliminates a state court forum

The City of Portland argues that, if its franchise fees are taxes and the federal courts lack jurisdiction, then TWTC can go to state court to vindicate its rights. City's Brief in Opposition, at 35. That is the result contemplated by the TIA if a "plain, speedy and efficient remedy" exists in state court. 28 U.S.C. § 1341. But the Telecom Act expressly does not "modify, impair or supersede . . . any State or local law pertaining to taxation." Telecom Act, §601(c)(2), 110 Stat. 143, codified at note to 47 U.S.C. § 152. So if the franchise fees are taxes, a state court would be unable to apply the Telecom Act to enforce the intent of Congress to facilitate competition among telecommunications providers. As a consequence, there is no "plain, speedy and efficient remedy" in state court, and the TIA should not bar federal court jurisdiction.

C. Barring enforcement of the Telecom Act does not advance the purpose of the TIA

This case does not fit the mold of cases that Congress intended to exclude from federal courts. This Court stated in *Jefferson County v. Acker*, 527 U.S. 423, 435 (1999), that, in enacting the TIA, "Congress, it appears, sought particularly to stop out-of-state corporations from using diversity jurisdiction to gain injunctive relief against a state tax in federal court, an advantage unavailable to in-state taxpayers denied anticipatory relief under state law."

That policy might be implicated here if TWTC were challenging Portland's franchise fees based on a *state law* claim. As an example, two of the cases the City cites for the rule that the TIA bars an attack on franchise fees were, in fact, diversity jurisdiction challenges based on state law. *Keleher v. New England Tel. & Tel. Co.*, 947 F.2d 547, *abrogated on other grounds, Jefferson County v. Acker*, 527 U.S. 423 (1999), *Independent Coin Payphone Ass'n v. City of Chicago*, 863 F. Supp. 744 (N.D. Ill. 1994) (City's Brief in Opposition, at 31). But TWTC has sued based on federal question jurisdiction, and seeks to vindicate a *federal right*. Allowing the City of Portland to override the Telecom Act and impose discriminatory rights-of-way fees without review by a federal court does not advance the purpose of the TIA.

TWTC notes, finally, that the Court earlier this month granted certiorari in a case concerning the TIA, *Levin v. Commerce Energy, Inc.*, No. 09-223 (Petition for Certiorari Granted November 2, 2009). That case – in which it is undisputed that the assessment is a tax –

addresses the role of the federal courts in the administration of state taxation systems.

III. TWTC Requests that the Court invite participation by the Solicitor General

TWTC respectfully requests that the Court invite the Solicitor General to file a brief expressing the views of the United States on these critical issues of telecommunications policy.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, TWTC respectfully requests that the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* QWEST CORPORATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The Amicus Curiae will address two questions:

1. Federal Court Jurisdiction over Federal Telecommunications Act Claims: The question presented is whether state and local right-of-way assessments imposed on telecommunications companies are indeed "fees" (as opposed to taxes) and therefore subject to federal jurisdiction, as every Court of Appeals that has addressed the issue—except the Ninth Circuit—has held.

2. Federal Preemption Under Section 253(a) of the Telecommunications Act: The question presented is whether section 253(a) prohibits state and local legal requirements that materially inhibit or limit a telecommunications provider's ability to compete in a fair and balanced legal and regulatory environment, as the FCC and every other Court of Appeals that has addressed the issue—except the Ninth Circuit—has held.

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INTEREST OF THE AMICUS CURIAE[1]

Qwest Corporation was a co-plaintiff with tw telecom of oregon, llc ("TWT") in the District Court proceedings and a co-appellant with TWT before the Ninth Circuit. This Court's ruling will directly affect Qwest's ability to provide service to its customers in the City of Portland, in the State of Oregon, and throughout the nation.

Qwest provides local and long-distance wire-line services, broadband, and WiFi telecommunications service throughout the United States. Qwest's provision of these services to cities and their residents is consistent with the direction of the federal Telecommunications Act and the FCC's recent Broadband Initiative. But these services can only be provided if Qwest has fair and consistent access to the public rights-of-way in the cities in which it operates. A telecommunications network—poles, wires, fiber-optic conduits, equipment cabinets, and power sources—depends upon the ability to occupy the rights-of-way.

Qwest thus has a substantial interest in ensuring that federal courts exercise jurisdiction to hear cases involving right-of-way fees under section 253 of the federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "Telecom Act"), and in ensuring that the Telecom Act continues to serve its key purpose: limiting local regulations that restrict and inhibit competition, thereby providing affordable access to telecommunications

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curie*, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have been given appropriate notice of amicus curie's intention to file and have consented to the filing of this brief. Such consents are being lodged herewith.

nationwide and fostering advancements in telecommunications that benefit all Americans.

By virtue of its long-standing, national network, Qwest has wide-ranging experience with local regulations concerning the public rights-of-way and with the regulations in the City of Portland, Oregon. Consequently, it is uniquely situated to offer a perspective on how the Ninth Circuit's opinion below limits the use of the public rights-of-way and impedes technological innovation.

SUMMARY OF THE ARGUMENT

The Ninth Circuit held that federal courts do not have jurisdiction to hear challenges to local right-of-way fees under the Telecom Act. Equally troubling, the court held that telecommunications companies are entitled to protections of section 253(a) of the Telecom Act only if a local regulation "ha[s] the effect of prohibiting the provision of telecommunications services" by preventing the provider's "continued operation." On both issues, the Ninth Circuit's opinion has created a circuit split that warrants this Court's review.

On the jurisdiction issue, the Ninth Circuit held that percentage-of-revenue-based right-of-way fees are "taxes" for purposes of the Tax Injunction Act and, as a result, denied federal courts of jurisdiction to hear challenges to such fees under the Telecom Act. This is contrary to the Fifth Circuit, which has ruled that gross-revenue-based franchise fees are not taxes but the price paid to rent use of public rights-of-way, and contrary to the First, Second, Sixth, Tenth, and Eleventh Circuits, which have exercised jurisdiction to hear challenges to local right-of-way fees.

On the section 253(a) issue, the Ninth Circuit held that a state or local regulation that does not expressly prohibit the provision of telecommunications services is preempted only if it prevents a provider's "continued operation."

Neither the FCC nor any other circuit has required a company to show it is unable to operate before applying the protections of the Telecom Act.

Review is also necessary for two other key reasons. First, the Ninth Circuit's ruling permits state and local governments to adopt any fee regulations whatsoever, as long as they denominate the fees as taxes. This will discourage and delay the development of telecommunications services and is contrary to the pro-competitive, deregulatory purposes of the Telecom Act. Second, without review, telecommunications companies will continue to be harmed by the Ninth Circuit's literal prohibition standard. This is exactly what the record in this case showed: both Qwest and TWT lost revenue, customers, and market share in Portland as a result of Portland's unlawful and oppressive regulatory scheme. Qwest respectfully requests that this Court grant review to prevent such harm.

ARGUMENT

I. The Ninth Circuit's Application of the Tax Injunction Act Has Created a Circuit Split and Denied Federal Courts of Jurisdiction to Rule on the Lawfulness of Local Right-of-Way Fees.

As petitioner points out, to provide services in Portland, private telecommunications carriers must enter into a franchise with the City. The franchise requires the payment of a recurring annual fee in exchange for use of the City's streets. Such fees vary broadly between carriers, with, for example, some carriers paying percentage-of-revenue-based fees and others paying per-linear-foot charges.[2] The

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[2] The below record cites are included in Qwest's Addendum and Excerpts of Record filed with the Ninth Circuit in *Time Warner Telecom of Oregon, LLC, et al. v. City of Portland*, Nos. 06-36023, 06-

fees are specifically designated by Portland as fees for use of the rights-of-way.[3]

A. A Circuit Split Exists over Whether State and Local Right-of-Way Assessments Are Fees or Taxes.

The Ninth Circuit held that Portland's right-of-way fees are "taxes" for purposes of the Tax Injunction Act.[4] As a result, courts in the Ninth Circuit do not have jurisdiction to hear challenges to such local right-of-way fees under the Telecom Act. The Ninth Circuit stands alone nationally, and its ruling has created a split among the circuits.

Shortly after passage of the Telecom Act in 1996, the Fifth Circuit, when examining a 5% gross-revenue-based franchise fee, held that "[f]ranchise fees are not a tax . . . but essentially a form of rent: the price paid to rent use of public right-of-ways." *City of Dallas, Texas v. FCC*, 118 F.3d 393, 397 (5th Cir. 1997). Following the Fifth Circuit, numerous other circuits have exercised jurisdiction to hear challenges to local right-of-way fees under the Telecom Act. *See Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18-19 (1st Cir. 2006) (exercising jurisdiction and ruling that gross-revenue-based right-of-way fee violated section 253 because it would "negatively affect" the challenging entity's profitability by imposing a "substantial increase in costs"); *TCG New York, Inc. v. City*

36024, 06-36061 (9th Cir. 2009) (hereinafter referred to as Qwest's Addendum, "ADD" and Excerpts of Record, "QER") and attached as Appendices hereto. *See* 1 ADD, QCC Franchise § 3.1(A), Appendix at 1a; 2 ADD, TWT Franchise § 3.1(A), Appendix at 1a; 3 ADD, IRNE Franchise § 3(A)(1)(b), Appendix at 2a; 8 ADD, QC Temporary Revocable Permit § c.1, Appendix at 2a.

[3] *See id.*

[4] *See* Memorandum of the United States Court of Appeals for the Ninth Circuit Filed on April 8, 2009, attached as Appendix A to Petitioner's Petition for Writ of Certiorari, ¶ 3.

of White Plains, 305 F.3d 67, 79 (2d Cir. 2002) (exercising jurisdiction and finding unlawful under section 253 gross-revenue-based right-of-way fee that was applied discriminatorily); *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624-25 (6th Cir. 2000) (exercising jurisdiction and finding a 4% gross-revenue-based right-of-way fee lawful); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270-72 (10th Cir. 2004) (exercising jurisdiction and determining that substantial increases in right-of-way fees are unlawful under section 253 where they do not meet the stringent test under section 253(c)); *Bell South Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1180, 1186-92 (11th Cir. 2001) (exercising jurisdiction when considering gross-revenue fee under both state and federal law, and remanding case to district court for further consideration under section 253).

Even the Ninth Circuit, in a prior opinion, affirmed a district court order finding that fees "for use of the public right-of-way . . . essentially are rent for use of city-owned property [and] do not amount to taxes under the TIA." *Qwest Commc'ns Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1092 (N.D. Ca. 2001) (internal quotation marks and citations omitted), *aff'd*, 433 F.3d 1253 (9th Cir. 2006).

In short, every circuit, except the Ninth Circuit in its current opinion, has concluded that federal courts have jurisdiction to hear challenges to local right-of-way fees under the Telecom Act. The Ninth Circuit's conclusion to the contrary has denied telecommunications companies operating on the west coast access to federal courts and the protections of the Telecom Act.

B. Without Supreme Court Review, Federal Courts in the Ninth Circuit Will Be Unable to Enforce the Telecom Act as to Fee Challenges.

For 13 years federal courts have exercised jurisdiction to determine the lawfulness of right-of-way fees under the Telecom Act. It makes perfect sense that these courts have exercised this jurisdiction. Section 253 limits state and local governments to charging only compensatory fees in exchange for use of their rights-of-way that are fair, reasonable, competitively neutral, and non-discriminatory. *See* 47 U.S.C. § 253(c). These right-of-way fee limitations are a critical component of the Telecom Act. The Telecom Act's pro-competitive purposes are safeguarded by the limitations. *See* H.R. Rep. No. 104-458, at 113 (1996) (Conf. Rep.) (Telecom Act was designed to create a "pro-competitive, deregulatory national policy framework"). Such limitations also prevent prohibitory right-of-way pricing by local governments. The Ninth Circuit now stands alone as the only circuit that will not allow such challenges to be heard in a federal court. This ruling thus has the effect of carving the western region of the United States out of these important protections of federal jurisdiction.

II. By Limiting Section 253 Challenges Only to Laws or Ordinances That Literally Exclude a Carrier from Providing Service, the Ninth Circuit Has Created a Broad Circuit Split That Harms Companies in the Ninth Circuit.

A. A Circuit Split Exists over the Standard for Federal Preemption Under Section 253(a) of the Telecom Act.

In section 253 of the Telecom Act, Congress took regulation of telecommunications competition away from

local government. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999). The deregulatory, pro-competitive purpose of the Telecom Act, as discussed above, explicitly "prohibits state and local regulation that impedes the provision of 'telecommunications service.'" *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 491 (2002) (citation omitted).

In accordance with the Telecom Act's purposes, the FCC has stated that section 253 preempts not just those regulations that literally prohibit a carrier from providing a service but also any legal requirement that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *In re California Payphone Assoc.*, 12 F.C.C.R. 14,191, 14,206, ¶ 31 (1997). In other words, a prohibition does not need to be complete or insurmountable to run afoul of section 253(a). *See, e.g., TCG New York*, 305 F.3d at 76 (interpreting and applying *California Payphone*). It is sufficient if a legal requirement materially interferes with a carrier's ability to compete. *See, e.g., Santa Fe*, 380 F.3d at 1271 (interpreting and applying *California Payphone*).

In its decision below, the Ninth Circuit expanded the FCC's preemption standard that it had previously adopted in its recent decision, *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (en banc), and held that a state or local regulation that does not expressly prohibit the provision of telecommunications services is preempted by 47 U.S.C. § 253(a) only if it results in a complete ban on the provision of services. Indeed, the Ninth Circuit expressly stated that "[t]he in-kind requirements that Qwest challenges . . . do not have the effect of prohibiting the provision of telecommunications services, **as demonstrated by Qwest's continued**

operation."[5] Thus, anything short of a complete ban passes muster under the Ninth Circuit's analysis.

The Ninth Circuit previously recognized, in the *Sprint Telephony* decision, that its interpretation of section 253(a) conflicted with the interpretations of several other circuits. *See Sprint Telephony*, 543 F.3d at 577. Specifically, the court stated that the First, Second, and Tenth Circuits adhere to a "broad[er] interpretation of § 253(a)." *Id.* Here, as applied to a complete factual record, that circuit split has grown even wider. No other circuit has required a company to show it is unable to operate before applying the protections of the Telecom Act. To the contrary, all other circuits to address the issue have held that such a literal prohibition is not required.

In *Puerto Rico Telephone*, for example, the First Circuit held that the relevant inquiry is whether "the [regulation] materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." 450 F.3d at 18 (internal quotation marks and citation omitted) (relying upon *California Payphone*, 12 F.C.C.R. at 14,206, ¶ 31). The First Circuit added that "a prohibition does not need to be complete or insurmountable to run afoul of § 253(a)." *Id.* (internal quotation marks and citation omitted). Applying that standard, the court invalidated a local ordinance that imposed a 5% fee on gross revenues from all telephone calls originating within the locality. *Id.* at 11-12, 23-24. The court reasoned that the ordinance would "negatively affect [the challenging provider's] profitability," give rise to "a substantial increase in [the provider's] cost," and "place a significant burden [on the provider]." *Id.* at 18-19.

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[5] *See* Memorandum of the United States Court of Appeals for the Ninth Circuit Filed on April 8, 2009, attached as Appendix A to Petitioner's Petition for Writ of Certiorari, ¶ 1 (emphasis added).

Similarly, in *TCG New York*, the Second Circuit held that the test under section 253(a) is whether a regulation "'materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'" 305 F.3d at 76 (*quoting California Payphone*, 12 F.C.C.R. at 14,206, ¶ 31). Like the First Circuit, the Second Circuit noted that "a prohibition does not need to be complete or 'insurmountable' to run afoul of § 253(a)." *Id.* (citation omitted). The court proceeded to invalidate a local ordinance that subjected non-incumbent providers to a host of substantive and procedural requirements and pursuant to which the locality sought to impose a 5% gross-revenue fee on the challenging provider. *Id.* at 71-73, 82. The court concluded that the ordinance was preempted because it would pose "obstacles . . . to [the challenging provider's] ability to compete in [the locality] on a fair basis." *Id.* at 76-77.

The Eighth Circuit concluded that the provider "must show an existing material interference with the ability to compete in a fair and balanced market." *Level 3 Commc'ns, LLC v. City of St. Louis*, 477 F.3d 528, 531-33 (8th Cir. 2007) (*citing California Payphone*, 12 F.C.C.R. at 14,206, ¶ 31), *cert. denied*, 129 S. Ct. 2859 (2009). Importantly, the Eighth Circuit also recognized that a challenging provider "need not show a complete or insurmountable prohibition[,]" as the Ninth Circuit has required. *Id.*

Lastly, in *Santa Fe*, the Tenth Circuit held that the relevant inquiry under section 253(a) is whether a regulation "would 'materially inhibit' the provision of [telecommunications] services." 380 F.3d at 1271 (*quoting California Payphone*, 12 F.C.C.R. at 14,206, ¶ 31). The court, like the First, Second, and Eighth Circuits, also observed that "an absolute bar on the provision of services

is not required." *Id.* Applying that standard, the court invalidated a local ordinance that required providers to register with the locality and obtain lease agreements before using public rights-of-way. It focused on the fact that the ordinance contained a provision giving the locality "broad discretion in determining whether or not to accept a registration or lease application." *Id.* at 1270. The court reasoned that the provision would "den[y] telecommunications providers the 'fair and balanced legal and regulatory environment' the [Telecom Act] was designed to create" and that other provisions would "create a significant burden" and impose "substantial costs" on the challenging provider. *Id.* at 1270-71 (*quoting California Payphone*, 12 F.C.C.R. at 14,206, ¶ 31).

In short, there exists a clear split between the circuits on the applicable standard under section 253(a). This case has only broadened that circuit split, and left the largest circuit denying telecommunications companies the protections of the Telecom Act unless a local regulation will actually result in a company going out of business.

B. Without Supreme Court Review, Companies Operating in the Ninth Circuit Will Continue to Be Harmed.

A direct result of the Ninth Circuit's opinion is that telecommunications companies will lose customers, revenue, and market share. This is exactly what the record—which was fully developed—shows happening in this case. In order to obtain a franchise in Portland, as discussed above, the city demands payment of a recurring annual fee. *See supra* at 3-4. These fees, which are designated by Portland for the use of the rights-of-way, vary dramatically between carriers. *See id.* The record also shows that Portland's Charter gives it the right to demand conduit or fiber in exchange for a franchise. The City

generally exercises this authority without fail, making such donations to the City a condition of obtaining a franchise.[6] The only franchise without such an in-kind requirement is the one the City granted to its own carrier, IRNE. IRNE is not required to build or contribute any in-kind facilities. Like the fees, the record shows that the City demands widely divergent in-kind compensation from the carriers.[7] The City then donates to IRNE the in-kind facilities demanded from franchisee carriers.[8] The City admits that IRNE's prices are substantially reduced because it does not have to recover the costs of the in-kind assets in its prices.[9] IRNE's prices are approximately 50% below what they would be if IRNE were realizing its actual costs.[10]

Under the Ninth Circuit's present ruling, federal courts do not even have jurisdiction to determine whether the fees are unlawful. And yet, Qwest has lost established customers to IRNE, including Portland Public Schools, Port of Portland, Multnomah County, Multnomah Educational School District, and Metro.[11] The record showed that each of these customers identified pricing as a reason for the switch to IRNE. The loss of these customers alone amounts to approximately 11% of Qwest's annual revenue in the government and education markets in the Portland area.[12] The record also shows that TWT has lost business

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[6] *See* 9 QER (Soloos Depo. I) at 30:6-14, Appendix at 2a; 9 ADD (Charter) § 2-105(a)(24), Appendix at 3a; 10 ADD (Charter) § 10-210(d) (emphasis added), Appendix at 4a.

[7] *See* 12 QER (Olson Depo. I, Ex. 55) at 000083, Appendix at 8a.

[8] 13 QER (Jesuale Depo., Ex. 92) at 000085, Appendix at 5a.

[9] 30 QER (Gray Depo. II) at 52:3-23, Appendix at 6a.

[10] *See* 8 QER (Olson Depo. I) at 86:1-13, Appendix at 6a; 35 QER (Fitzsimmons Decl.) ¶¶ 6, 7, 12, 13, not included in Appendix due to being filed under seal; 32 QER (Jesuale email), Appendix at 7a.

[11] *See* 34 QER (Stepan Decl.) ¶¶ 8-10 & Ex. A, not included in Appendix due to being filed under seal.

[12] *See id.*

and been unable to compete against IRNE because of IRNE's artificially low rates.[13] Carriers will continue to lose customers, revenue, and market share if this Court does not grant certiorari and resolve the matter.

C. This Case Satisfies the Concerns Set out in the Solicitor General's Amicus Curiae Brief in the Sprint Telephony Matter.

In the *Sprint Telephony* matter, filed earlier this year, the Solicitor General submitted an amicus brief. *See* Brief for the United States as Amicus Curiae, *Level 3 Commc'ns, LLC v. City of St. Louis*, Nos. 08-626, 08-759, 2009 WL 1497821 (U.S. May 28, 2009). The Solicitor General acknowledged that there was a circuit conflict concerning the interpretation of section 253(a), *id.* at *15 ("The Eighth and Ninth Circuits correctly recognized that their view of the Section 253(a) preemption standard differs in some respects from that of First, Second, and Tenth Circuits."), but suggested that review should not be granted because the *Sprint Telephony* case was based on a facial challenge, *id.* at *9. Here, the record below was fully developed in the District Court and shows that Qwest is losing customers, revenue, and a substantial market share as a result of the City of Portland's regulations. *See supra* at 10-12. The evidence also shows that TWT is losing customers and revenue. *See id.* Thus, the record that was purportedly absent in *Sprint Telephony* exists in this case, underscoring the propriety of granting TWT's petition.

Lastly, the FCC's decision in *California Payphone* does not resolve the confusion, as the Solicitor General suspected it might not. *See Level 3 Commc'ns*, 2009 WL 1497821, at *14 ("Portions of the Ninth Circuit's

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[13] *See* 20 QER (Nicholson Decl.) ¶ 6, not included in Appendix due to being filed under seal.

decision . . . could be read to suggest that a Section 253 plaintiff must show effective preclusion—rather than simply material interference—in order to prevail[,]" and if so, the resulting legal standard "would frustrate the policy of open competition that Section 253 was intended to promote."). To be sure, each of the circuits references and relies upon the FCC's decision. Even so, the circuits widely diverge in the interpretation and application of the standard. The First, Second, Eighth, and Tenth Circuits have acknowledged that any regulation that materially inhibits or materially interferes with the provision of services violates section 253(a), as the FCC stated. *See supra* at 7-10. The Ninth Circuit, on the other hand, now requires regulations that literally prohibit the provision of services. *See id.* In other words, the FCC's ruling has not cleared up the circuit split to any degree, again underscoring the need for this Court's review.

CONCLUSION

For the foregoing reasons, Qwest respectfully requests that the Court grant TWT's petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

QCC Franchise § 3.1(A)
ORDINANCE NO. 171914

Section 3. COMPENSATION AND AUDITING.

3.1 *Amount of compensation.*

(A) As compensation for the benefits and privileges under this Franchise, and in consideration of permission to use the Streets of the City, the Grantee shall pay as a franchise fee to the City, through the duration of this Franchise, an amount equal to the greater of the Minimum Annual Franchise Fee or $2.63 per linear foot of Grantee's Telecommunications System in the Streets. The total number of linear feet of Grantee's Telecommunications System located in the Streets shall be determined by the as-built maps submitted by the Grantee, and approved by the City Engineer, as provided in Section 6.1(B).

TWT Franchise § 3.1(A)
ORDINANCE NO. 171566

Section 3. COMPENSATION AND AUDITING.

3.1 *Amount of compensation.*

(A) As compensation for the benefits and privileges under this Franchise and in consideration of permission to use the Streets of the City, the Grantee shall pay as a Franchise fee to the City, through the duration of this Franchise, the greater of either: (a) the Minimum Annual Franchise Fee; or, (b) an amount equal to five percent (5%) of the Grantee's Gross Revenues. However, revenues derived from the sale or lease of facilities and subject to Subsection 3.1(B), shall be excluded from the Gross Revenues calculation of franchise fees under this Subsection 3.1(A).

IRNE Franchise § 3(A)(1)(b)
ORDINANCE NO. 177348

Section 3. COMPENSATION AND AUDITING.

A. *Amount of compensation.*

1.b. An amount equal to five percent (5%) of IRNE's Gross Revenues. However, revenues derived from the sale, lease or IRU of facilities and subject to Section 3(A)(2) shall be excluded from the Gross Revenues calculation of franchise fees under this Subsection.

QC Temporary Revocable Permit § c.1
SUBSTITUTE
ORDINANCE NO. 175757

c. COMPENSATION AND AUDITING.

1. *Amount of compensation.* As compensation for the benefits and privileges under this Permit and in consideration of permission to use the Streets of the City, Qwest shall pay as a Permit fee to the City, throughout the duration of this Permit, an amount equal to seven percent (7%) of Qwest's Gross Revenues.

David R. Soloos June 17, 2005 Deposition
Excerpts at 30:6-14

Q. Okay. I think I'm stating your answer correctly because I believe earlier you testified that, you know, when it comes to in-kind compensation, the City has not, as far as you're aware, ever negotiated away that as a part of compensation.

A. We've negotiated it. It's changed occasionally from franchise to franchise, but I don't sit here and recall any instance that that provision has been removed.

PORTLAND CITY CHARTER [EXCERPTS]

Portland City Charter § 2-105(a)(24)

SECTION 2-105 CONTINUATION OF SPECIFIC POWERS.

The City of Portland by its Council has power and authority, subject to the provisions, limitations, and restrictions contained in this Charter or in statute, to exercise any power or authority granted to the City by statute, general or special, or by this Charter, and may do any other act necessary or appropriate to carry out such authority, or exercise any other power implied by the specific power granted.

(a) Among such specific powers, the City has power and authority:

24. To provide or require conduits under the streets, lanes, alleys and public places of the City or any part or parts thereof for the use of telephone, telegraph, electric light and other wires, or for other purposes, either by constructing said conduits itself or authorizing or requiring their construction by others upon such terms and conditions as the Council may impose, and to regulate and control the use of such conduits, and to prescribe and establish reasonable rentals to be paid by any person or company using any of said conduits by whomsoever the same may be constructed for the use thereof, and to provide for the collection of such rentals, in addition to the ordinary processes, by such summary methods as it may deem proper. If any such grant be made to any person, firm or corporation, such grantee shall not have power to sublet the same or the use of the same to any person, firm or corporation engaged in selling, hiring, leasing or otherwise

receiving any income from the business or purpose for which it desires to use such conduits, without such person, firm or corporation first obtaining, as provided in this Charter, a franchise for such business, purpose or use.

Portland City Charter § 10-210(d)

Section 10-210. CONDITIONS AND RESTRICTIONS.

(d) No franchise shall be granted without fair compensation to the City therefor, either by way of direct payment or by reduction of rates, fares, or charges, and in addition to the other forms of compensation to be therein provided, the grantee may be required to pay annually to the City such part of its gross receipts as may be fixed in the grant of said franchise. This provision shall not exempt the holder of the franchise from any lawful taxation upon its property nor from any license, charge or imposition not levied on account of such use.

Nancy Jesuale Dep. (Ex. 92 at 000085)

4. *Where is the city getting the money to put IRNE in place?*

The city has the franchising authority over the rights-of-way for telecommunications and public utilities. Over the years, we've been requiring any telecommunications carrier who wants to place conduit in our streets for their network to build additional conduit for the City as a condition of receiving a franchise and permit. We had collected these empty conduit runs all over the city, and the Cable and Franchise office was very interested in seeing them put to use. We began designing a fiber plant that would take advantage of those conduit resources and create a wide-area network or a metropolitan area network for use by the city. As we started to do that, we realized we should collaborate with other public sector agencies because in some places we had conduit where they needed it and in other places they had fiber where we needed it.

Another significant financial outcome of this project will be the ability to leverage millions of dollars of network assets regionally, networks that otherwise would develop independently without coordination. The implementation of the fully realized network is estimated to save all local governments in the region millions of dollars in networking cost to the users over leased alternatives. Preliminary analysis indicated that the City of Portland alone can expect to eliminate nearly 95% of its leased data circuits, while increasing bandwidth per site an average of 500%. This can be done in a cost neutral financial package where no new money is necessary.

Mark Gray January 18, 2006
Deposition Excerpt at 52:3-23

Q. Understood. What I was asking you about is the capital costs of in kind contributed assets. IRNE had no cost of acquisition of those assets; correct?
A. Correct.
Q. And it has no liability or expense in its operating budget for those assets; correct?
A. I don't understand your use of the word liability. But there is no reoccurring cost for the use of those assets.
Q. Right. In other words, it's paying nothing for those in kind capital assets?
A. Correct.
Q. And so the pricing in the cost recovery that's associated with the pricing does not take into account the in kind contributed assets?
A. The acquisition of them, correct.
Q. Okay. And it also doesn't take in account the assets that IRNE utilizes from CTIC?
A. It does not take into consideration the acquisition of those assets.

David C. Olson April 5, 2005
Deposition Excerpts at 86:1-13

Q. Okay. Now let me ask you, if you could, turn to page 92 marked at the bottom. Under "Recommended Utilization of Franchise Assets," could you read the first paragraph under that heading, please?
A. "Franchise assets available to the City are extremely valuable. As an example, the City has empty duct available, which requires that fiber be pulled through the duct at a cost of approximately $2 per foot. In comparison, placing duct alone can cost from $35 to $100 per foot."
Q. Okay. Do you have any reason to disagree with that statement?
A. No.

Nancy Jesuale
February 28, 2002 email

Smith, Ralph

From:	Jesuale, Nancy
Sent:	Thursday, February 28, 2002 9:38 AM
To:	Grewe, Tim
Cc:	Feely, Tom (OMF); Smith, Ralph; Ayres, Nancy; Walters, Ben; Norm Peterson (E-mail); Jim Deason (E-mail); Olson, David
Subject:	IRNE Advisory Board Meeting Feb 27

Yesterday we had our first advisory board meeting, which was extremely successful. IRNE Partners in attendance included Portland Community College, Multnomah County, David Douglas School District, Multnomah Educational School District, METRO. We reviewed some "price points" for IRNE services, although I let them know that the rates were still under review.

The result of the meeting will be several IRNE service orders—telephone service for David Douglas, several fiber circuits for Multnomah County, and a fiber build into MESD headquarters. Very very successful meeting.

We will formalize pricing and file with the OPUC within two weeks. Our pricing is 20-40% below Qwest and AT&T and you can expect a hailstorm of backlash when they figure that out. I am thinking about how best to cover for that.

David C. Olson Depo. I. (Ex. 55 at 000083)

CLEC'S

Company	?	Date	Category of Data	Approx Footage (feet)
ELI		7/29/1998	Informally Provided	75,153
Enron	x	9/1/2000	Partial As-Builts	2,500
Firstpoint (Enron)	x	7/29/1998	Informally Provided	126,428
FirstWorld	x		No Data	
GST		7/29/1998	Informally Provided	261,594
Level3			No Data	
MCI		7/29/1998	Informally Provided	24,746
Wcom / MFS		7/29/1998	Informally Provided	12,606
TCG/AT&T LNS	x		No Data	
Metromedia		6/23/2000	Proposed Construction Prints	120,000
McLeodUSA		4/17/2000	Proposed Construction Prints	250,000
Nextlink (XO)		3/1/2000	Proposed Construction Prints	250,000
All Phase		12/1/2000	Proposed Construction Prints	250,000
Sigma Networks			No Data	
Point-To-Point				
AT&T		7/29/1998	Informally Provided	18,769
FTV			No Data	
IXC			No Data	
Pacific Fiber Link (360 networks)		12/1/2000	As Builts	92,603
Pacific Telecom Cable (PTI)		7/29/1998	Informally Provided	2,033
Qwest (pre USWest)		7/29/1998	Informally Provided	16,327
Sprint		7/29/1998	Informally Provided	8,496
WCI			No Data	
Wcom / MFS		7/29/1998	Informally Provided	12,606
Broadwing			No Data	
Williams Comm			No Data	
Adelphia			No Data	
Global Crossing			No Data	
Portland General Broadband			No Data	
Tyco			No Data	
UNI			No Data	

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